87-34

No. 87-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

FERDINAND E. MARCOS
and
IMELDA R. MARCOS,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the immunity accorded by U.S. courts to a former head of a foreign state may be waived by a successor government of the foreign state.

2. Whether the Executive can, through the use of a sole Executive agreement, by-pass federal legislation that entitles the witness to the privileges available under the laws of a foreign country when that country seeks the assistance of U.S. courts in obtaining documents produced by the witness.

3. Whether a fear of foreign prosecution, founded upon the actual filing of criminal charges in a foreign country, is sufficient to invoke the privilege against self-incrimination provided by the Fifth Amendment to the U.S. Constitution.

4. Whether the Court of Appeals applied an incorrect constitutional standard in holding that the U.S. Government would be engaged in a "joint venture" with a foreign prosecution (which would trigger Fifth Amendment protections) only where the foreign prosecution is "inspired, instigated or controlled" by the U.S. Government.

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Petitioners Ferdinand E. Marcos and Imelda R. Marcos respectfully pray that a writ of certiorari issue to review the decision and judgment of the Court of Appeals for the Fourth Circuit entered in this case on May 5, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals, affirming the decision of the District Court, is reported at —— F.2d —— and is reproduced in the Appendix at 1a. The unreported opinion of the District Court for the Eastern District of Virginia (Hilton, J.) appears in the Appendix at 11a.

JURISDICTION

The judgment of the Court of Appeals was entered on May 5, 1987. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution Amendment V:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

STATUTE INVOLVED

This case involves 28 U.S.C. § 1782, which is set forth in the Appendix at 14a.

EXECUTIVE AGREEMENT INVOLVED

This case involves the Agreement on Procedures for Mutual Legal Assistance, June 11, 1986, United States-Republic of the Philippines, which is reprinted in the Appendix at 15a.

STATEMENT OF THE CASE

Petitioner Ferdinand E. Marcos is the former President of the Republic of the Philippines. Imelda R. Marcos is his wife. On February 26, 1986, President and Mrs. Marcos, along with members of their entourage, were brought to the United States by U.S. military aircraft. The removal of President Marcos from the Phlippines marked the culmination of a highly publicized series of events which led to the overthrow of the Marcos government and the installation of Corazon Aquino as the new President of the Philippines.

The U.S. Government moved quickly to assist the new Philippine government in its efforts to investigate and prosecute former President Marcos, his family, and his associates. Upon arrival of the Marcos party in Hawaii, the Customs Service impounded property (including currency and jewelry) brought in with President Marcos and his entourage, based on a claim of ownership by the new Philippine government. Customs refused to release the property, and that refusal has been judicially upheld.

Azurin v. von Raab, 803 F.2d 993 (9th Cir. 1986), *cert. denied*, —— S. Ct. —— (1987).

Soon after the Marcos' arrival in Hawaii, the Aquino government requested copies of documents that had been brought to Hawaii with the Marcos party and detained by the Customs Service. According to public statements made by Michael H. Armacost, former U.S. Ambassador to the Philippines and U.S. Under Secretary of State for Political Affairs, the request was made for "law enforcement" purposes of the new Philippine government. His declaration in a civil suit involving President Marcos states:

> It would be injurious to the foreign-policy interests of the United States generally as well as in this case were the President and his authorized agents for the conduct of foreign policy and law enforcement to be unable to provide relevant and appropriate law enforcement information to a friendly foreign government in accord with international law practice and comity.

Declaration of Michael H. Armacost, dated March 15, 1986.

On March 19, 1986, pursuant to this request, the U.S. Government provided copies of these documents to the Philippine government. Shortly thereafter, the Solicitor General of the Philippines filed criminal charges against President Marcos, his wife, and other individuals associated with the President, under the Penal Code of the Philippines. The Amended Complaint charges defendants with the crimes of conspiracy and violations of the Anti-Graft and Corrupt Practices Act, and violations of Articles 210-221 of the Philippine Penal Code. Petitioners and their co-defendants are charged with having obtained unlawful profits by taking undue advantage of their position and authority; with misappropriating foreign military and/or economic aid funds; with receiving kickbacks from companies doing business with the government; and with creating agricultural, industrial and commercial monopolies for their personal benefit.

In December 1986, Petitioners received subpoenas *duces tecum* and *ad testificandum* issued by a grand jury in the Eastern District of Virginia. The grand jury is investigating possible corruption in U.S. arms contracts with the Philippines, including the possibility of the payment of illegal kickbacks.[1] The subjects comprising the grand jury investigation are "congruent" with the criminal charges brought against Petitioners in the Philippines. *United States v. Under Seal (Araneta)*, 794 F.2d 920, 924 (4th Cir.), *cert. denied*, 107 S. Ct. 331 (1986). It is undisputed that the documents sought by the grand jury, or evidence derived from these documents, would be relevant and useful to the pending Philippine prosecution.

On June 11, 1986, as part of the continuing effort of the two countries to cooperate in the criminal investigations of President Marcos and his associates, the United States and the Philippines entered into an international agreement ("Mutual Assistance Agreement") to secure mutual legal assistance with respect to the criminal investigations ongoing in both countries. Agreement on Procedures for Mutual Legal Assistance, June 11, 1986,— U.S.T.—, T.I.A.S.—. *See* 15a, *infra*. The Mutual Assistance Agreement commits the two signatories to share evidence in the investigations of certain corporations and individuals alleged to have provided kickbacks to obtain military and public works contracts with the Philippine government, which is the subject of both the grand jury investigation in the Eastern District of Virginia and of the criminal complaint brought against Petitioners in the Philippines. Under the Mutual Assistance Agreement, the United States will be obligated to provide the Philippine

[1] A number of other individuals charged in the Philippine criminal action, including Irene Marcos Araneta and Gregorio Araneta III (President Marcos' daughter and son-in-law), Ambassador Benjamin Romualdez (Mrs. Marcos' brother), General Fabian Ver, and Eduardo Cojuangco, have been subpoenaed to appear before the Alevandria grand jury.

government with documents produced by Petitioners in response to the grand jury subpoenas. *See* 16a, *infra.*

On January 21, 1987, Petitioners moved to quash the grand jury subpoenas in the District Court for the Eastern District of Virginia. Petitioners raised three arguments: (1) that they were shielded from compelled production of documents to the grand jury under the customary international law doctrine of head of state immunity; (2) that they were entitled to assert their privilege against self-incrimination under the Philippine Constitution; and (3) that the United States was engaged in a "joint venture" with the Philippine government in the prosecution of Petitioners, which justified their assertion of the Fifth Amendment privilege. Additionally, Petitioners raised the argument submitted for this Court's review by President Marcos' daughter, Irene Marcos Araneta, and son-in-law, Gregoria Araneta III, in the Araneta's recent petition for a writ of certiorari, *viz.* that, setting the joint venture issue aside, Petitioners are entitled to assert their Fifth Amendment privilege against self-incrimination because of a real and substantial fear of prosecution in the Philippines. *Araneta v. United States,* No. 86-172, Petition for Writ of Certiorari (August 4, 1986), *cert. denied,* 107 S. Ct. 331 (Oct. 20, 1986).

Less than two weeks after Petitioners filed their motion to quash, on February 3, 1987, the Philippine government, in cooperation with the State Department, issued a diplomatic note purporting to waive the immunity enjoyed by Petitioners under international law. A copy of this note is reprinted in the Appendix at 13a.

At a closed hearing on February 11, 1987, the District Court for the Eastern District of Virginia (Hilton, J.) denied Petitioners' motion to quash. The Government then moved to confer "act of production" immunity on Petitioners under 18 U.S.C. §§ 6002-03. (The Government did not seek testimonial immunity at that time, and thus the

issue of whether petitioners' *testimony* can be compelled is not before the Court on this appeal.) *See* 9a, *infra.* The district court granted the Government's motion to confer "act of production" immunity, at which time Petitioners, who were not present at the hearing, represented through counsel that they would refuse to produce the documents despite the grant of immunity. The district court held Petitioners in contempt, ordered that they be confined, and stayed the confinement order pending appeal.

The Court of Appeals affirmed. On the issue of head of state immunity, the court held that "respect for Philippine sovereignty" required the court to honor the Philippine government's revocation of Petitioners' head of state immunity. The court also rejected Petitioners' arguments that they were entitled to assert the privilege against self-incrimination under both the Philippine and U.S. Constitutions.

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted To Review The Court Of Appeals' Ruling That The Immunity Accorded By U.S. Courts To A Former Head Of State Under International Law Can Be Waived By A Successor Government

In the proceedings below, Petitioners asserted that under the customary international law doctrine of head of state immunity, they are shielded from the compelled production of documents relating to activities and events that occurred while President Marcos was head of state of the Philippines. The Fourth Circuit did not challenge the principle that a former head of state living in the United States is entitled to claim head of state immunity. It held, however, that the Philippine government had effectively waived Petitioners' head of state immunity in the February 3, 1987 diplomatic note.

Despite the increasing number of cases in which head of state immunity has arisen,[2] considerable uncertainty surrounds the scope of the doctrine. *See generally* Note, *Resolving the Confusion Over Head of State Immunity: The Defined Rights of Kings*, 86 Colum. L. Rev. 169 (1986). The decision below decides one critical aspect of the doctrine: whether a foreign country can waive the immunity of its former head of state. Because no other U.S. court has addressed this question,[3] the Fourth Circuit's decision is likely to be viewed by both domestic and foreign courts—and foreign governments—as the authoritative American view on this subject. For this reason, prompt review of its conclusion is required.

The Fourth Circuit's conclusion that the current Philippine regime can waive Petitioners' immunity is fundamentally incompatible with the policies that underlie head of state immunity (and, indeed, sovereign immunity generally). Moreover, application of the Fourth Circuit's conclusion would lead to practical results which could severely undermine U.S. international relations and lead to attempted interference by other nations with the im-

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[2] In the past twenty-five years, seven head of state immunity cases have been before the U.S. courts. *See Republic of the Philippines v. Marcos*, Misc. No. 86-706 (WHO) (N.D. Cal.), Civ. Nos. 86-0213, 86-0155 (D. Hawaii); *Domingo v. Marcos*, Civ. No. C82-1055V (July 14, 1983); *O'Hair v. Wojtyla*, No. 79-2463, (D.D.C. Oct. 3, 1979) (excerpted in 1979 Dig. U.S. Prac. Int'l L. 897); *Kilroy v. Windsor (Prince Charles, The Prince of Wales)*, No. C-78-291 (N.D. Ohio Dec. 7, 1978) (excerpted in 1978 Dig. U.S. Prac. Int'l L. 641-43); *Psinakis v. Marcos*, No. C-75-1725 (N.D. Cal. 1975) (excerpted in 1975 Dig. U.S. Prac. Int'l L. 344-45); *Kendall v. Saudi Arabia*, (S.D.N.Y. 1965) (excerpted in 1977 Dig. U.S. Prac. Int'l L. 1053-54); *Chong Boon Kim v. Kim Yong Shik*, (Haw. Cir. Ct. Sept. 9, 1963) (excerpted in 58 Am. J. Int'l L. (1964)).

[3] The Fourth Circuit noted that the effect of the Philippine government's waiver appeared to be a question of first impression. *See* 4a, *infra*.

munities accorded under U.S. law to our own former heads of state. This analysis has four aspects.

First, as a practical matter, implementation of the Fourth Circuit's conclusion in this and similar cases could severely embarrass the United States in its international relations, since the court's mechanical adherence to a waiver theory provides no flexibility to deal with unexpected shifts in foreign political alignments. The significance of this problem was recently recognized by the U.S. Court of Appeals for the Ninth Circuit in *Republic of the Philippines v. Marcos*, Nos. 86-6091, 86-6093 (9th Cir. June 4, 1987). In that case, the court denied the Philippine government's request for a preliminary injunction to prevent the transfer of property held by or on behalf of the Marcoses. In holding that adjudication of the Marcoses' rights was likely to be barred by the act of state doctrine and/or the political question doctrine, the court observed:

> [J]ust as the position of our own executive branch is not dispositive on the issue, *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 762 (1972) . . . so can we not give dispositive effect to the pronouncement of a foreign sovereign, particularly one with a stake in the current litigation. . . . While the acquiescence—indeed anxious invitation—of the current Philippine government allays one concern, it heightens others, making us leery of judicial involvement in this dispute.
>
> We cannot shut our eyes to the political realities that give rise to this litigation, nor to the potential effects of its conduct and resolution. Mr. Marcos and President Aquino represent only two of the competing political factions engaged in a struggle for control of the Philippines. While the struggle seems to be resolving itself in favor of President Aquino, this may not be the end of the matter. Only four years ago, the tables were turned, with Mr. Marcos in power and Mrs. Aquino and her husband in exile in the United States. While we are in no position to judge these

> things, we cannot rule out the possibility that the pendulum will swing again, or that some third force will prevail.

Slip op. at 30-31 (footnotes omitted) (emphasis added).

As a practical matter, the question of immunity for the former head of a foreign state will arise only where there is substantial friction with the incumbent government, and hence a likelihood of waiver. No former head of a foreign state is likely to take up residence in the United States without a conflict of that kind. Judicial sensitivity to the concerns raised in this case is therefore warranted not only in light of the current political realities in the Philippines, but also because of the recurring nature of the problem presented. The United States has frequently been a refuge for former heads of foreign states. It has assumed this role of sanctuary willingly, as a concomitant of its own history. Moreover, the twentieth century has seen a number of heads of state lose power to hostile regimes, only to regain their positions at a later date. In this perspective, it is dangerously short-sighted for the court below to create an exception to the head of state immunity heretofore assumed to be absolute.

Moreover, despite its U.S. grand jury origins, this case essentially involves a dispute between the Philippines and its former President.[4] To accord validity to the Philippines' purported waiver will clearly result in ultimate resolution of foreign domestic disputes by U.S. courts.[5]

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[4] That the U.S. grand jury action is directly related to the Philippines' own efforts to prosecute President Marcos is highlighted by the Mutual Assistance Agreement. *See* 15a, *infra*.

[5] At this stage, the dispute before the Court concerns the assertion of head of state immunity and its purported waiver. If the waiver is upheld, the U.S. courts can expect to be embroiled in additional intra-Philippine disputes between the current Philippine regime and President Marcos.

This is a role that the U.S. judiciary has consistently avoided.[6]

That the U.S. courts should not accord validity to the Philippines' purported waiver—and indeed should not become embroiled in a foreign internal dispute which they lack the legal competence to resolve—is confirmed by the issue of immunity created by the Philippine Constitution. According to the Ninth Circuit, the Philippine Constitution provides:

> The President shall be immune from suit during his tenure. Thereafter, no suit whatsoever shall lie for official acts done by him or by others pursuant to his specific orders during his tenure.[7]

The existence of this constitutional provision strongly suggests that the Philippine government's waiver of President Marcos's immunity is unconstitutional under Philippine law. If so, the waiver should not be accepted by this

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[6] The role of foreign arbiter has also been avoided by the courts of other nations when faced with similar foreign domestic disputes. Only a few weeks ago, a French court declined to decide a claim brought by Haiti against its former head of state and former minister of finance to recover funds allegedly diverted by those individuals during their tenure in office. *L'Etat Haitien v. Duvalier*, Nos. 3636/86, 1761/87, Judgment of June 23, 1987, Tribunal de Grande Instance, Grasse. While this decision was technically based on the lack of jurisdiction of French judicial courts over administrative matters, it effectively relegated Haiti to its own courts for purposes of claims against its former head of state. The court reasoned that even if foreign law permitted the adjudication of such a dispute by judicial courts, fundamental principles of French law (French *"ordre public"*) required that a French court could not adjudicate a dispute that it could not decide if it were a dispute between a French authority and its agent.

[7] This provision appeared in Article VII, Section 17 of the Philippine Constitution at the time that President Marcos was president, and, according to the Ninth Circuit, it "apparently, has been carried forward into the current constitution." *Republic of the Philippines v. Marcos*, Nos. 86-6091, 86-6093, slip op. at 36 (9th Cir. June 4, 1987).

Court as a valid legal act. The existence of the provision also reinforces the proposition that U.S. courts are not competent to decide foreign domestic legal disputes where the domestic law of the foreign state is controlling.

A second aspect of the immunity issue involves considerations of reciprocity. In a recent report by the Australian Law Reform Commission, which studied worldwide state immunity laws as part of the process of developing an Australian state immunity law, the Commission emphasized the importance of reciprocity in shaping state immunity determinations:

> To the extent that Australia is entitled to expect that other states will respect its authority over Australian matters, so it is reasonable that Australian law should acknowledge and respect the equivalent authority of other states. Conversely, if Australian law allows, for example, *the service of process on visiting heads of state* . . ., Australia cannot complain when other countries assert equivalent rights.

Australian Law Reform Commission, *Report No. 24, Foreign State Immunity* 23 (1984) (emphasis added).

This consideration has direct application to the present controversy. Petitioners submit that the United States would be outraged if a former U.S. president was served with process while visiting the Philippines—or Iran or the Soviet Union—and the local courts upheld the assertion of jurisdiction. Yet this result can be anticipated if the Fourth Circuit's decision is permitted to stand.

Third, U.S. law relating to the immunity of U.S. heads of state is relevant to the present case by analogy.[8] Under U.S. law, presidential privileges and immunities extend beyond the end of a president's term. *See Nixon v. Fitzgerald*, 457 U.S. 731 (1982). In *Nixon v. Administrator*

[8] Moreover, one of the sources of international law is "the general principles of law recognized by civilized nations." Statute of the International Court of Justice, June 26, 1945, art. 38(1)(c).

of General Services, 433 U.S. 425 (1977), this Court considered a challenge by former President Nixon to an Act providing, *inter alia*, for archival scrutiny of presidential papers [9]—documents arguably not different from those sought from President Marcos in this proceeding—on the ground that presidential privilege shielded the records from such scrutiny. The Court specifically considered whether lack of support from an incumbent president would deprive a former president of the right to assert the privilege. "Acceptance of that proposition" the court noted, "would, of course, end this inquiry." 433 U.S. at 448. However, the Court did not view the positions of successor Presidents Carter and Ford as dispositive and instead held that "the privilege survives the individual President's tenure." *Nixon v. Administrator of General Services*, 433 U.S. 425, 449 (1977) (quoting the Solicitor General). While the views of the incumbent President were considered relevant to the *weight* assigned to this qualified privilege, the Court upheld the statute only because "Appellant's [Nixon's] right to assert the privilege is specifically preserved by the Act." *Id.* at 455. In other words, the Court upheld the constitutionality of the Act because the Act recognized and safeguarded the former President's constitutional privilege.

In a recent opinion, the Justice Department has implemented the implication of the *AGS* case that the privilege cannot be waived by a successor:

> We start from the proposition, recognized in *Nixon v. Administrator* (433 U.S. at 448-449), that a former President may independently assert executive privilege....
>
> The Court's conclusion and reasoning in *Nixon v. Administrator* strongly indicate, in our view, that an incumbent President should respect a former Presi-

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[9] Presidential Recordings and Materials Preservation Act, Pub. L. No. 93-526, §§ 101-106, 88 Stat. 1695-98 (1974) (codified as 44 U.S.C.A. § 2111 note (West Supp. 1987)).

> dent's claim of executive privilege if the incumbent either (a) would not have personally invoked the privilege under the circumstances or (b) does not believe that the documents fall within the scope of the privilege. A former President's privilege would be of little value if it were dependent upon the ratification of his successors. Moreover, we believe that it would be inconsistent with the rationale underlying the former President's privilege for the incumbent to sit as judge of the validity of a predecessor's claim. . . . Nonetheless, a former President has independent authority to claim executive privilege precisely because an incumbent may not be willing to safeguard the confidential communications of prior (and perhaps politically antagonistic) administrations.

U.S. Department of Justice, Office of Legal Counsel, Re: Nixon Paper Regulations (Memorandum of February 18, 1986) at 25.[10]

The argument for disregarding the Philippines' purported waiver is even more compelling than the arguments presented above by the Justice Department. In the domestic setting the Court in *AGS* and the Justice Department were interpreting the scope of a qualified privilege, while in the present case this Court is concerned with an absolute immunity for foreign heads of state, which is necessitated by considerations of sovereignty. *See, e.g., Hatch v. Baez*, 7 Hun. 596 (N.Y. Sup. Ct. 1876); 1 L. Oppenheim, *International Law* 758-762, 763 (8th ed. 1955). As such, while a U.S. president may not claim immunity from a criminal subpoena, *United States v. Nixon*, 418 U.S. 683 (1974), a foreign sovereign must be guaranteed just such immunity in consideration of international principles of sovereignty. As observed by

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[10] In *Public Citizen v. Burke*, 655 F. Supp. 318 (D.D.C. 1987), the United District Court for the District of Columbia upheld a challenge to this opinion. However, the court did not disagree that a former president could assert the privilege despite an incumbent's waiver. The government has appealed the district's court's decision.

Oppenheim, a foreign sovereign "must be exempt from every kind of criminal jurisdiction." 1 L. Oppenheim, *International Law* 759 (8th ed. 1955) (emphasis added). *See also The Christina* [1938] A.C. 485 at 508-09 ("the independent status in international law of the foreign sovereign . . . gives the sovereign, so far as concerns Courts of law, an immunity even in respect of conduct in breach of the municipal law").

Finally, the Fourth Circuit's conclusion that the current Philippine government can waive Petitioners' immunity is in conflict with one of the basic policies that underlies the head of state immunity doctrine. Head of state immunity is intended, in part, to promote the proper functioning of governments; and this purpose, articulated in this Court's decisions in the context of immunity for domestic officials, applies equally in the international sphere:

> In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of government, if he were subjected to any such restraint.

Spaulding v. Vilas, 161 U.S. 483, 498 (1896), *quoted in Nixon v. Fitzgerald*, 457 U.S. 731, 745 (1982). Judicial acceptance of the power of successor governments to waive the immunity of their former leaders sharply undercuts the policy of protecting the ability of national leaders to conduct the affairs of state unencumbered by the fear of being subjected to judicial process.

For these reasons, Petitioners submit that the Fourth Circuit's ruling that political adversaries have the power to expunge at will international legal protections from their political opponents once they have been retired from

office should not be allowed to stand. The Fourth Circuit's decision is not only in conflict with both international and domestic law, but also severely constricts the flexibility of the United States to provide sanctuary to foreign heads of state. Because of the importance of this question for U.S. international relations, review by this Court is appropriate.

II. Certiorari Should Be Granted To Review The Court Of Appeals' Holding That The Executive Has The Power To By-Pass An Act Of Congress Through The Use Of A Sole Executive Agreement

As discussed *supra*, the United States and the Philippine governments have entered into a Mutual Assistance Agreement providing for cooperation with respect to criminal investigations ongoing in both countries.[11] *See* 15a, *infra*. The agreement obligates the United States to provide the Philippine government with evidence relating to corruption in connection with arms sales to the Philippines, which is the subject matter of the Alexandria grand jury investigation. As a result, it is undisputed that the U.S. will be obligated by the agreement to provide the Philippine government with copies of any documents produced by Petitioners to the grand jury.

By its own terms, the operation of the Mutual Assistance Agreement is subject to the "law, practice and procedure" of the United States. *See* 16a, *infra*. The basic defining legislation for the agreement is 28 U.S.C. § 1782, which governs judicial assistance to foreign tribunals. *See* 14a, *infra*.[12]

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[11] We have been advised by the Treaty Desk at the State Department that the agreement is a so-called "sole" Executive agreement concluded pursuant to the inherent powers of the President under the Constitution and to 22 U.S.C. § 2656, which governs the authority of the Secretary of State to manage foreign affairs.

[12] This is reflected in a declaration made by the Assistant United States Attorney in charge of the Alexandria grand jury investigation regarding the Mutual Assistance Agreement:

> "The June 11, 1986 *Agreement on Procedures for Mutual Legal Assistance* makes it clear that information and evidence

Among its provisions, § 1782 states that witnesses who provide evidence in a U.S. proceeding at the request of a foreign litigant or tribunal are entitled to assert the privileges available under the laws of the requesting state. Thus, because of the nexus with the Philippine investigation established here by the Mutual Assistance Agreement, Petitioners should be entitled to assert the privilege against self-incrimination under the Philippine Constitution.[13]

The Circuit Court rejected this argument, holding, despite the obligation of the U.S. Government to provide the Philippines any documents produced to the grand jury by Petitioners, and despite the Philippine government's active involvement in the procurement of Petitioners' documents through its production of a "waiver" of Petitioners' immunity, that there is "no evidence" that the Philippine government "requested" the grand jury to subpoena Petitioners' documents.

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gathered by the United States will be disclosed to the Philippine government only in accordance with 'the law, practice and procedure' of the United States. *See* Agreement ¶ 13. *See also* 28 U.S.C. §§ 1781 and 1782 (which require courts of the United States to assist foreign and international tribunals and litigants in gathering evidence in the United States pursuant to letters rogatory)."

Declaration of Theodore S. Greenberg, Esq., filed in *United States v. Under Seal (Romualdez)*, reprinted in the Appendix at 19a.

[13] Buttressing this conclusion, the model mutual assistance treaty developed jointly by the State Department, the Department of Justice and the Treasury Department in 1978 expressly provides that:

> "[a] person whose testimony is requested under this treaty shall be compelled to appear, testify and produce documents, records and articles to the same extent as in investigations or proceedings in the requested State. *Such person may not be so compelled if under the law in either State he has a personal privilege to refuse. . . .*"

See 1978 Dig. U.S. Prac. Int'l L. 857, 861 (emphasis supplied).

The Fourth Circuit's decision is both wrong and dangerous, for it authorizes the Executive to by-pass Congressional legislation—in this case, § 1782—through the use of a sole Executive agreement. This holding conflicts with the extant authority in this area, including decisions of this Court, which establish that the Executive cannot, through the use of a sole Executive Agreement, by-pass the provisions of federal legislation. *See, e.g., United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955); *Swearingen v. United States*, 556 F. Supp. 1019 (D. Colo. 1983); *see also Department of State, Foreign Affairs Manual*, Vol. 11, Ch. 700 § 721.2(3) ("[t]he President may conclude an international agreement on any subject within his constitutional authority so long as the agreement is not inconsistent with legislation enacted by Congress in the exercise of its constitutional authority"); *see generally* RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 135, Reporters' Note 5 (Tent. Draft No. 6, 1985) *Cf. Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636-38 (1952) (Jackson, J., concurring) ("when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . .").

The use of mutual assistance agreements has expanded exponentially since they were first introduced in the mid-1970's in connection with the scandal involving bribes and kickbacks allegedly paid to Japanese businessmen and officials by representatives of the Lockheed Aircraft Corporation and other U.S. aerospace companies. *See generally* Ristau, *International Cooperation in Penal Matters: The "Lockheed Agreements," reprinted in Transnational Aspects of Criminal Procedure* (Clark Boardman 1983).[14]

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[14] Ristau lists over two dozen mutual assistance agreements that have been concluded over the past decade. *See id.* at 100 n.23.

Because of the growing reliance on mutual assistance agreements, the decision below will have an adverse impact on the rights of a wide and expanding class of persons, not just former heads of state. For this reason, prompt review and reversal by this Court is required.

III. Certiorari Should Be Granted To Review The Court Of Appeals' Ruling That The Fifth Amendment Does Not Protect A Witness From Producing Documents To A Federal Grand Jury Based On Fear Of Foreign Prosecution

In its decision below, the Fourth Circuit refused to reconsider its decision in *United States v. Under Seal* (*Araneta*), 794 F.2d at 920, in which it held that, despite a real and substantial danger of foreign prosecution, the Fifth Amendment did not entitle President Marcos' daughter and son-in-law to persist in refusing to testify before the grand jury in the Eastern District of Virginia once they had been granted use and derivative use immunity by the court. A copy of the *Araneta* decision is reprinted in the Appendix at 28a. The decision below requires review and reversal by this Court.

Though the question of whether the privilege against self-incrimination is available based on a fear of foreign prosecution is frequently recurring, the issue still has not been decided by this Court. The Court voted to consider this question in *Zicarelli v. New Jersey State Commission of Investigation*, 406 U.S. 472, 478 (1972), but did not reach the issue because the Court concluded that the witness "was never in real danger of being compelled to disclose information that might incriminate him under foreign law," *id.* at 480. This issue was presented again to the Court in *Araneta*. Chief Justice Burger, as Circuit Justice, granted a stay pending application for certiorari of the order holding the Aranetas in contempt, finding that:

> [I]t is more likely than not that at least five Justices will agree with the Court of Appeals that the ap-

> plicants face the kind of risk found lacking in *Zicarelli*, and will therefore reach and decide the question reserved in that case. And although such matters cannot be predicted with certainty, I conclude there is a "fair prospect" that a majority of this Court will decide the issue in favor of the applicants. *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964), contains dictum which, carried to its logical conclusion, would support such an outcome.

See 24a, *infra.* Following Chief Justice Burger's resignation from the Court, the Court ultimately denied the Aranetas' petition for a writ of certiorari, with three Justices (Brennan, White, Marshall) voting to grant certiorari.[15]

The constitutional question reserved in *Zicarelli* and raised again in *Araneta* is presented in much sharper relief in this case. Any doubt concerning the Fourth Circuit's determination that the Aranetas were confronted with a real and substantial risk of criminal prosecution in the Philippines is absent here. It is undisputed that President Marcos and his wife, not his children, are the principal targets of the Philippine prosecution. Closely related to this is the fact that the Fourth Circuit's conclusion in *Araneta* that Rule 6(e) is inadequate to ensure that the Aranetas' testimony would not be disclosed to the Philippine government is even more powerfully supported here, where President Marcos himself has been ordered to produce documents to the grand jury. This case, as the Circuit Court noted, "has excited an unusual degree of public interest." *See* 36a, *infra.* The pressures for "inadvertent disclosure," recognized in *Araneta*, are present in the extreme in the instant case.[16]

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[15] A stay pending application for certiorari to hear this same issue was granted by Justice Stevens in *Mikutaitis v. United States*, 107 S. Ct. 3 (Sept. 17, 1986).

[16] Indeed, undersigned counsel were surprised to find reporters present in court at argument before the Fourth Circuit in this case, which, prior to that moment, had remained under seal.

Accordingly, the issue of whether the Fifth Amendment is available based on fear of foreign prosecution is presented unencumbered in this case, and should be decided by this Court. Substantial confusion exists on this issue. *Compare Yves Farms, Inc. v. Rickett*, No. 86-174-3-MAC, slip op. (M.D. Ga. May 13, 1987) (recognizing applicability of the privilege where there is a real and substantial risk of foreign prosecution); *Mishima v. United States*, 507 F. Supp. 131, 135 (D. Alaska 1981) (same); *United States v. Trucis*, 89 F.R.D. 671, 673 (E.D. Pa. 1981) (same); *In re Cardassi*, 351 F. Supp. 1080, 1085-86 (D. Conn. 1972) (same); *with United States v. Under Seal (Araneta)*, 794 F.2d at 920; *Parker v. United States*, 411 F.2d 1067, 1070 (10th Cir. 1969), vacated and dismissed as moot, 397 U.S. 96 (1970); and *Phoenix Assurance Co. v. Runck*, 317 N.W.2d 402 (N.D.), *cert. denied*, 459 U.S. 862 (1982).

The issue also has attracted considerable academic attention. *Compare* Note, *Testimony Incriminating Under the Laws of a Foreign Country—Is There a Right to Remain Silent?* 11 N.Y.U. J. Int'l L. & Pol. 359 (1978); Comment, *Fear of Foreign Prosecution and the Fifth Amendment*, 58 Iowa L. Rev. 1304 (1973); Comment, *Criminal Law—Self-Incrimination—the Fifth Amendment Protects a Witness Who Refuses to Testify for Fear of Self-Incrimination Under the Laws of a Foreign Jurisdiction*, 5 Rut.-Cam.L. Rev. 146 (1973) *with* Note, *The Reach of the Fifth Amendment Privilege When Domestically Compelled Testimony May Be Used In A Foreign Country's Court*, 69 Va. L. Rev. 875 (1983).[17]

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[17] This issue has arisen repeatedly, although most courts have not reached the constitutional question because of their threshold finding that the witness had not demonstrated a substantial risk that compelled testimony would be used against him in a foreign prosecution. *See, e.g., In re President's Commission on Organized Crime*, 763 F.2d 1191 (11th Cir. 1982); *In re Grand Jury*, 705 F.2d 1224 (6th Cir. 1982), *cert. denied*, 461 U.S. 927 (1983) (collecting cases); *In re Flanagan*, 6912 F.2d 116 (2d Cir. 1982); *In re*

Because this issue is recurring and represents an important aspect of Fifth Amendment law, review by this Court is appropriate.

Moreover, even a brief look at the Fourth Circuit's decision in *Araneta* shows that the decision is wrong, as it rests on an incorrect analysis of this Court's precedent. The linchpin of the *Araneta* holding is the statement that "the Fifth Amendment privilege applies only where the sovereign compelling the testimony and the sovereign using the testimony are both restrained by the Fifth Amendment from compelling self-incrimination." *See* 38a, *infra.* From this premise, the Fourth Circuit concludes that the Fifth Amendment is not available to the Aranetas (and thus is not available to the Marcos' in this case) because the Fifth Amendment does not bind the Philippines and therefore does not prohibit the use of compelled incriminating testimony in a Philippine court. *See* 38-39a, *infra.*

The *Araneta* holding rests on this Court's analysis in *United States v. Murdock*, 284 U.S. 141 (1931), in which the Court held, at a time when the Fifth Amendment applied only to the federal government, that the Fifth Amendment did not forbid the United States from compelling testimony from a witness that would incriminate him under state law. The reasoning of *Murdock*, however, was overruled explicitly by this Court in *Murphy v.*

Baird, 668 F.2d 432 (8th Cir.), *cert. denied*, 456 U.S. 982 (1982); *In re Federal Grand Jury Witness*, 597 F.2d 940 (2d Cir. 1972); *In re Quinn*, 525 F.2d 222 (1st Cir. 1975); *In re Tierney*, 465 F.2d 806 (5th Cir. 1972), *cert. denied*, 410 U.S. 914 (1973). The issue has also arisen but become moot when witnesses have opted to testify rather than suffer contempt sanctions as the cost of litigating the scope of the privilege. *See, e.g., Parker v. United States*, 411 F.2d 1067 (10th Cir. 1969), *opinion vacated and dismissed as moot*, 397 U.S. 96 (1970) where a witness chose to purge herself of contempt by testifying during the course of appellate proceedings.

Waterfront Commission, 378 U.S. 52 (1964), which held that "the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law." *Id.* at 77-78. In *Murphy*, the Court said:

> [N]either the reasoning nor the authority relied on by the Court in *United States v. Murdock*, 284 U.S. 141, supports its conclusion that the Fifth Amendment permits the Federal Government to compel answers to questions which might incriminate under state law.

Id. at 73. The Court later reiterated its rejection of *Murdock*:

> In light of the history, policies and purposes of the privilege against self-incrimination, we now accept as correct the construction given the privilege by the English courts and by Chief Justice Marshall and Justice Holmes. *See United States v. Saline Bank of Virginia, supra; Ballman v. Fagin, supra. We reject —as unsupported by history or policy—the deviation from that construction only recently adopted by this Court in United States v. Murdock, supra, and Feldman v. United States, supra.*

Id at 77 (emphasis supplied). In light of these clear statements by this Court, the Fourth Circuit's reliance on *Murdock* is completely erroneous, and requires correction by this Court.

Indeed, the *Murphy* analysis of the policies and purposes of the privilege against self-incrimination compel the conclusion here that the privilege should be available if the compelled testimony would incriminate the witness in a foreign country. The *Murphy* Court articulated the policies of the privilege as follows:

> [o]ur unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather

> than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load," [citation]; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," [citation]; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."

Id. at 55.

The heart of the *Murphy* decision is the Court's observation that "[m]ost, if not all, of these policies and purposes are defeated when a witness 'can be whipsawed into incriminating himself under both state and federal law'. . . ." 378 U.S. at 55, *citing Knapp v. Schweitzer*, 357 U.S. 371, 385 (Black, J., dissenting). The Court observed that this "has become especially true in our age of 'cooperative federalism,' where the Federal and State Governments are waging a united front against many types of criminal activity." *Id.* at 55-56. Today, 25 years after the *Murphy* decision, the same reasoning applies to an age where cooperation in criminal investigations has spilled over national borders. It is because both international cooperation and the "cooperative federalism" that spawned the *Murphy* decision bear an identical impact on the policies and purposes of the privilege that the *Murphy* holding requires application by this Court in the instant case. As former Chief Justice Burger observed in granting the stay in *Araneta*, the reasoning of *Murphy*, "carried to its logical conclusion," mandates the conclusion that the privilege should be available based on a fear of foreign prosecution.

IV. Certiorari Should Be Granted To Review The Fourth Circuit's Holding That The U.S. Will Be Engaged In A Joint Venture With The Philippine Government For Constitutional Purposes Only Where The U.S. Inspired, Instigated Or Controls The Philippine Prosecution

The *Araneta* decision specifically reserved the question of whether the Fifth Amendment would be available based on a fear of foreign prosecution where it can be shown that the United States government was "participating" in the foreign prosecution:

> Fully mindful of our obligation to decide only the case before us, we nevertheless feel compelled to note what is not at issue in this case. First, there has been no attempt to show that the United States *inspired, instigated or controls* the Philippine prosecution [citations]. In addition, petitioners have not suggested that the United States, in compelling their testimony under a grant of immunity, pursues no legitimate purpose of its own, even if it also has an intention to assist a foreign government whose continued good will is of great strategic importance. In short, petitioners have not presented to us a claim of American participation in a foreign prosecution, either actually, through a joint venture with foreign law enforcement officials, or constructively, by means of employing such individuals as agents. The case before us does not require us to address either of these factual patterns, and we express no views on them at this time.

794 F.2d at 928 (emphasis added). *See* 42a, *infra.*

Federal participation in the Philippine prosecution would "constitutionalize" the non-federal activity, thus eliminating the basis of the court's holding in *Araneta* that the privilege against self-incrimination is not available because the sovereign using the testimony is not constrained by the Fifth Amendment. Under the Fourth Circuit's analysis, therefore, if the U.S. Government is engaged in a "joint venture" with the Philippine Govern-

ment, Petitioners will be entitled to persist in asserting the Fifth Amendment before the grand jury despite the grant of immunity from the U.S. Government.

In the proceedings below, Petitioners urged the Fourth Circuit to reconsider its conclusion, expressed in the above-cited passage, that the United States would be engaged in a "joint venture" with the Philippine government for constitutional purposes only where it can be shown that the U.S. government "inspired, instigated or controls" the Philippine prosecution. The court, without comment, declined to reconsider its decision.

The constitutional standard articulated by the Circuit Court is in direct conflict with the standard articulated by this Court in the cases which established the joint venture doctrine, *Byars v. United States*, 273 U.S. 28 (1927) and *Lustig v. United States*, 338 U.S. 74 (1949). These cases establish that a joint venture exists for constitutional purposes where there is *any* official involvement by the federal government in the non-federal investigation. Under these cases, decided before the U.S. constitution was applied to the states, federal participation in a state search acted to constitutionalize the search, rendering evidence obtained by unconstitutional means inadmissible in federal court.

Justice Frankfurter, writing for the Court in *Lustig v. United States*, provided a succinct explanation of the standard for finding a joint venture:

> [T]he crux of [the *Byars*] . . . doctrine is that a search is a search by a federal official if he had a hand in it . . . . The decisive factor in determining the applicability of the *Byars* case is the actuality of a share by a federal official in the total enterprise of securing and selecting evidence by other than sanctioned means. It is immaterial whether a federal agent originated the idea or joined in it while the search was in progress. So long as he was in it before the object of the search was completely ac-

> complished, he must be deemed to have participated in it.

338 U.S. at 78-9.

As discussed above, the past decade has seen a sharp increase in international cooperation in the area of law enforcement. In the coming years, U.S. officials will become increasingly involved in cooperative efforts with the law enforcement officials of foreign countries. In this context, the decision below, which is in direct conflict with the seminal decisions of this Court, will create substantial uncertainty regarding the level of U.S. participation in a foreign prosecution that establishes a "joint venture" for constitutional purposes. There is no reason for this Court to await further developments in this area before exercising its powers of review. Because the need for a clear standard in this area is acute, certiorari should be granted to allow the Court to address this issue.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order and judgment of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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Dated: July 6, 1987

APPENDIX

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT COURT

No. 87-5527

IN RE: GRAND JURY PROCEEDINGS: JOHN DOE #700

UNITED STATES OF AMERICA,
Plaintiff—Appellee,

versus

(UNDER SEAL),
Defendant—Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA.
CLAUDE M. HILTON, DISTRICT JUDGE. (GJ-86-2)

Argued: April 6, 1987 Decided: May 5, 1987

BEFORE WINTER, Chief Judge, and WIDENER and PHILLIPS, *Circuit Judges.*

Richard A. Hibey (Timothy M. Broas; Gordon A. Coffee; Thomas P. Steindler; Anderson, Hibey, Nauheim &

Blair on brief) for Appellants; Vincent L. Gambale, Special Assistant, United States Attorney (Henry E. Hudson, United States Attorney; Theodore S. Greenberg, Assistant United States Attorney on brief) for Appellee.

WINTER, Chief Judge:

Ferdinand and Imelda Marcos appeal from the district court's order holding them in contempt for refusing to produce documents before a federal grand jury. The Marcos' argue that they are shielded from compulsory process by head-of-state immunity and that they are protected from providing evidence by the privilege against self-incrimination under both the Philippine and United States Constitutions. We affirm the contempt order.

I.

Ferdinand Marcos is the former President of the Republic of the Philippines, and Imelda Marcos is his wife. In early 1986, Mr. Marcos' presidency came to an end, and he was replaced by Corazon Aquino. On February 26, 1986, Mr. and Mrs. Marcos left the Philippines and flew to the United States, where they have remained ever since.

In January 1987 a federal grand jury in the Eastern District of Virginia issued subpoenas commanding the Marcos' to testify before the grand jury in February 1987 and to provide certain documents relating to the Marcos government. These subpoenas superseded broader subpoenas issued by the same grand jury in December 1986. The grand jury, which was convened before the Marcos' arrival in the United States, is investigating possible corruption in American companies' arms contracts with the Philippines. The Marcos' moved to quash the subpoenas, invoking head-of-state immunity and the privileges against self-incrimination under both the United States and the Philippine Constitutions. Shortly thereafter, on February 3, 1987, the Aquino government issued a diplomatic note purporting to waive any residual

head-of-state or diplomatic immunity enjoyed by Mr. and Mrs. Marcos.

At a closed hearing on February 11, 1987, at which the Marcos' were not present, the district court denied the motion to quash on the grounds that the Philippine government had waived the Marcos' head-of-state immunity and on the grounds that fear of foreign prosecution did not justify invocation of the United States or Philippine privilege against self-incrimination. The government then moved to confer "act of production" immunity on Mr. and Mrs. Marcos *in absentia* under 18 U.S.C. §§ 6002-6003. At that time, the government did not seek testimonial immunity, the court granted the government's motion to confer "act of production" immunity, and counsel for the Marcos' then stated that his clients would refuse to produce the documents notwithstanding the grant of immunity.* The district court held the Marcos' in contempt, ordered that they be confined, and stayed the confinement order pending this appeal.

II.

We turn first to the contention that Mr. Marcos is entitled to immunity from process as a former head of state and that Mrs. Marcos is entitled to immunity as the wife of a former head of state. Head-of-state immunity is a doctrine of customary international law. Generally speaking, the doctrine maintains that a head of state is immune from the jurisdiction of a foreign state's courts, at least as to authorized official acts taken while the ruler is in power. *See e.g.*, *Kilroy* v. *Windsor* (*Prince Charles, The Prince of Wales*), Civ. No. C-78-291 (N.D. Ohio 1978), *excerpted in* 1978 Dig. U.S. Prac.

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* In fact, by agreement of the parties, the documents had been transmitted to the district court pending "the ultimate resolution of [the Marcos'] claims of privilege and immunities with respect to th[e] documents." The agreement was approved by the district court which then ordered the documents sealed and accessible to no one until the outcome of this litigation.

Int'l L. 641-43; *Chong Boon Kim* v. *Kim Yong Shik* (Hawaii Cir. Ct. 1963), *excerpted in* 58 Am. J. Int'l L. 186-87 (1964); *Hatch* v. *Baez*, 7 Hun. 596 (N.Y. Sup. Ct. 1876). Like the related doctrine of sovereign immunity, the rationale of head-of-state immunity is to promote comity among nations by ensuring that leaders can perform their duties without being subject to detention, arrest or embarrassment in a foreign country's legal system. *See generally* Note, *Resolving the Confusion Over Head of State Immunity: The Defined Rights of Kings*, 86 Colum. L. Rev. 169, 171-79 (1986).

The exact contours of head-of-state immunity, however, are still unsettled. The cases do not make clear, for example, whether a state can waive one of its former ruler's head-of-state immunity, as the current Philippine government has endeavored to do here. Indeed, not one of the cases cited by the Marcos' even addresses the issue. *See O'Hair* v. *Wojtyla*, Civ. No. 79-2463 (D.D.C. 1979), *excerpted in* 1979 Dig. U.S. Prac. Int'l L. 897 (holding that suit against the Pope was prohibited by the Foreign Sovereign Immunities Act, 28 U.S.C. § 1601 *et seq.*); *Kilroy* v. *Windsor*, *supra* (holding Prince Charles immune in accordance with a State Department Suggestion of Immunity); *Psinakis* v. *Marcos*, Civ. No. C-75-1725 (N.D. Cal. 1975), *excerpted in* 1975 Dig. U.S. Prac. Int'l L. 344-45 (honoring a Suggestion of Immunity for then-President Marcos); *Chong Boon Kim* v. *Kim Yong Shik*, *supra* (honoring a Suggestion of Immunity for a Korean foreign minister). The effect of the Philippine government's "waiver" therefore appears to be a question of first impression.

We think the waiver should be given full effect. Head-of-state immunity is founded on the need for comity among nations and respect for the sovereignty of other nations; it should apply only when it serves those goals. In this case, application of the doctrine of Ferdinand and Imelda Marcos would clearly offend the present Philip-

pine government, which has sought to waive the Marcos' immunity, and would therefore undermine the international comity that the immunity doctrine is designed to promote. Our view is that head-of-state immunity is primarily an attribute of state sovereignty, not an individual right. Respect for Philippine sovereignty requires us to honor the Philippine government's revocation of the head-of-state immunity of Mr. and Mrs. Marcos.

Related principles of diplomatic immunity support the conclusion that head-of-state immunity can be waived by the sovereign. The Vienna Convention on Diplomatic Relations, to which the United States is a party, provides that diplomats of the sending state generally are immune from criminal and civil process of the receiving state, that they are "not obliged to give evidence as a witness," and that their persons are "inviolable." Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95, Articles 31(1), 31(2), 29. But the Convention also provides that "[t]he immunity from jurisdiction of diplomatic agents [and their families] . . . may be waived *by the sending State*. *Id.* Art. 32(1) (emphasis added). That waiver must be "express." *Id.* Art. 32(2). Clearly, an individual enjoys diplomatic immunity only at the pleasure of that individual's state. It is true that this provision of the Vienna Convention applies only to diplomats, but we see no reason that its rationale should not also apply to heads of state. It would be anomalous indeed if a state had the power to revoke diplomatic immunity but not head-of-state immunity.

The Marcos' contend that honoring the Philippine government's waiver will establish a system that is not "civilized," since "political enemies [will be] entitled to expunge international legal protections from their adversaries once they have been removed from office—peacefully or otherwise." This prospect does not change our view of the case. As we see it, a fundamental charac-

teristic of state sovereignty is the right to determine which individuals may raise the flag of the ship of state and which may not. This system may indeed be somewhat "uncivilized," as the Marcos' suggest, because it may degrade ex-rulers who happen to fall out of favor with their former constituents or political successors. But the system suggested by Mr. and Mrs. Marcos would be at least as uncivilized, for it would allow disfavored ex-rulers to mock the existing government by claiming immunity in the name of that government.

Finally, the Marcos' argue that the "more appropriate approach" to this issue is that taken by the Supreme Court in *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), in which the Court held former President Nixon immune from civil liability for his official acts. The issue in this case, however, is not whether the Marcos' may be civilly liable, but whether they are wholly immune from process. Moreover, as the government points out, an ex-President may be subpoenaed "to produce relevant evidence in a criminal case," *id.* at 760 (Burger, C.J., concurring), and even a sitting President may not claim immunity from a criminal subpoena. *United States* v. *Nixon*, 418 U.S. 683 (1974). We hardly think the *Nixon* cases support the Marcos' claim that they are entirely immune from process.

In sum, we hold that the current Philippine government has waived whatever head-of-state immunity was enjoyed by Ferdinand and Imelda Marcos. We therefore need not decide whether that immunity would have extended to unauthorized acts carried out during Mr. Marcos' term or whether it would have been limited to official authorized acts. Nor is it necessary for us to decide whether to defer to the opinion of the Deputy Legal Advisor of the State Department, expressed in a letter that is part of the record, that the Marcos' are not entitled to head-of-state immunity.

We affirm the district court's holding that the Philippine government has waived the Marcos' head-of-state immunity.

III.

The next question presented is whether 28 U.S.C. § 1782(a) forbids the government to take the Marcos' grand jury testimony in violation of the Philippine privilege against self-incrimination. The question arises because the United States and the Philippines have entered into an executive agreement providing for mutual cooperation with respect to criminal investigations ongoing in both countries. By its terms, however, each government is constrained by the "law, practice and procedure" of the United States. The Marcos' contend that 28 U.S.C. § 1782(a) makes applicable to the United States the Philippine privilege against self-incrimination.

Section 1782 regulates the taking of testimony in United States courts pursuant to formal requests, known as letters rogatory, from foreign governments: It states:

> § 1782. Assistance to foreign and international tribunals and to litigants before such tribunals.
>
> a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person . . . .
>
> A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

The section forbids the taking of testimony in violation of any privilege, including the Philippine privilege against self-incrimination.

The Marcos' argue that § 1782 applies here because the grand jury subpoenas were "made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal . . . ." We disagree. The subpoenas were issued as part of a grand jury investigation that began before the Marcos' arrived in the United States. Although the Philippine and United States government have entered into a Mutual Assistance Agreement, ensuring mutual cooperation in criminal investigations, there is no evidence that a Philippine "tribunal" issued "letters rogatory" or "requested" that the grand jury issue subpoenas to Mr. and Mrs. Marcos. The evidence is instead that the federal grand jury issued the subpoenas on its own initiative as part of its ongoing investigation into corruption in the dealings of American corporations with the Marcos regime. We therefore reject the argument that § 1781 applies to these grand jury subpoenas. It follows that § 1782 does not render applicable the Philippine privilege against self-incrimination.

IV.

The Marcos' also argue that compelling them to produce evidence will violate their Fifth Amendment privilege against self-incrimination, because the United States government's grant of prosecutorial immunity cannot shield them from prosecution in the Philippines. They ask us to reconsider our decision in *United States* v. *Under Seal* (*Araneta*), 794 F.2d 920, 925-28 (4th Cir.), *cert. denied*, 55 U.S.L.W. 3278 (1986), in which we held that the Fifth Amendment privilege against self-incrimination provides no protection from self-incrimination under foreign law. We decline to overturn our holding in *Araneta*, and we therefore affirm the district court's decision that enforcement of the subpoenas will not violate the Marcos' Fifth Amendment rights.

V.

Finally, the government contends that this appeal controls the Marcos' obligation to testify as well as their obligation to produce documents. The government stresses that the Marcos' moved to quash the subpoena's command that they testify as well as its command that they produce documents, and that their motion was denied in its entirely. But after the motion was denied, the government sought and obtained only "act of production" immunity for the Marcos'. It did not seek testimonial immunity. At the contempt hearing the government moved to hold the Marcos' in contempt only for refusing to "provide the documents called for in the subpoena," and the district court's order held the Marcos' in contempt only "for refusing to provide the documents to the grand jury." Neither the motion nor the order mentioned the Marcos' refusal to testify.

Only the contempt order, not the motion to quash, is appealable, *see Cobbledick* v. *United States*, 309 U.S. 323 (1940), and accordingly only the issues raised in the contempt order are before us. Therefore the only issue we decide is the validity of the order finding the Marcos' in contempt for failing to produce the documents. We express no view with regard to any refusal on the part of the Marcos' to testify before the grand jury should they be given testimonial immunity.

VI.

To summarize, we hold that the Marcos' are not entitled to head-of-state immunity from process to produce documents and that they are not shielded from providing such documents by the privilege against self-incrimination of either the Philippine or United States Constitutions.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-5527

UNITED STATES OF AMERICA,
Appellee,

v.

(UNDER SEAL),
Appellant.

[Filed May 26, 1987]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA.
CLAUDE M. HILTON, DISTRICT JUDGE

Upon consideration of appellants' emergency motion for stay of mandate and the appellee's response thereto,

IT IS ORDERED that the motion for stay is granted pending the filing of a petition for certiorari.

Entered at the direction of Chief Judge Winter with the concurrence of Judge Widener and Judge Phillips.

For the Court,

/s/ JOHN M. GREACEN
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Grand Jury 86-2

IN RE: GRAND JURY SUBPOENAS
TO FERDINAND and IMELDA MARCOS
(JOHN DOE 700)

ORDER

This matter came before the Court this 11th day of February, 1987, on the government's motion for a grant of immunity and an order requiring the above named witnesses to produce documents before the grand jury, motions to quash subpoenas to the witnesses, and a motion to hold them in contempt for refusing to provide the documents to the grand jury on the basis of former head-of-state immunity and various alleged privileges against self-incrimination. Counsel agreed that all motions be heard in the same hearing.

After hearing argument and for the reasons stated from the bench, it is hereby ORDERED:

That the government's motion for a grant of immunity and requiring the production of documents before the grand jury is GRANTED.

That the witness's motion to quash subpoenas is DENIED.

That, pursuant to 28 U.S.C. § 1826(a), the witnesses are in contempt of this Court's Order and Ferdinand Marcos and Imelda Marcos are committed to the custody of the Attorney General or his duly authorized represen-

tative until such time as they purge themselves of contempt or for the life of this grand jury.

That the commitment of Ferdinand Marcos and Imelda Marcos is stayed for a period of thirty (30) days, to permit an appeal of the Court's decision on the condition that they do not leave or travel outside the United States. If the Court of Appeals does not rule within the thirty (30) days, this commitment will be stayed until the Court of Appeals rules on the appeal from this Order.

/s/ Claude M. Hilton
United States District Judge

Date: February 11, 1987

Pasuguan Ng Pilipinas Embassy of the Philippines

Washington, D.C.

No. 0510188

The Embassy of the Philippines presents its compliments to the Department of State and has the honor to refer to the Department's Note of January 16, 1987 on the intention of a United States grand jury to seek the testimony of former President Ferdinand Marcos and his wife Imelda Marcos in connection with the investigation being conducted in the Eastern District of Virginia.

Taking note of the agreement on procedures for mutual legal assistance entered into between the Government of the United States and the Government of the Philippines, and other efforts of the parties to cooperate with respect to the investigation being conducted in the Eastern District of Virginia, the Government of the Philippines hereby waives any residual sovereign, head of state, or diplomatic immunity that former Philippine President Ferdinand Marcos and his wife Imelda Marcos may enjoy under international and U.S. law, including, but not limited to, Article 39(2) of the Vienna Convention on Diplomatic Relations, by virtue of their former offices in the Government of the Philippines. This waiver extends only to the testimony of Ferdinand and Imelda Marcos requested by the Government of the United States in the above case, and not to the Government of the Republic of the Philippines itself or to any of its other current or former officials.

The Embassy of the Philippines avails itself of this opportunity to renew to the Department of State the assurance of its highest consideration.

[SEAL]

3 February 1987

§ 1782. Assistance to foreign and international tribunals and to litigants before such tribunals

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

AGREEMENT ON PROCEDURES FOR MUTUAL LEGAL ASSISTANCE

The United States of America and the Republic of the Philippines, hereinafter referred to as "the parties," agree to provide mutual assistance through the procedures set forth below in the investigation of alleged illegal activities involving:

(1) Contracts and agreements previously contemplated or entered into by and between the Government of the Republic of the Philippines or its instrumentalities, officials, or citizens, and any of the following:

(A) Westinghouse Electric Corporation, Burns and Roe Corporation, their subsidiaries, affiliates, officers, employees or agents;

(B) Amworld, Inc., Telecom Satellites of America, Digital Contractors, Inc., their subsidiaries, affiliates, officers, employees, or agents;

(C) Raysond Moreno and any person having a relationship with Moreno and/or any entity or company in which he is directly or indirectly involved; and,

(2) Such other contracts, agreements, and transactions involving American or Philippine companies or citizens as may be implicated in the foregoing investigations or which the foregoing investigations may suggest are involved in separate illegal activities.

1. The parties agree to appoint competent authorities to carry out the procedures under this Agreement. The competent authority for the United States shall be the United States Department of Justice. The competent authority for the Republic of the Philippines shall be the Presidential Commission on Good Government.

2. All requests for assistance shall be communicated directly between the competent authorities or their designees.

3. Upon request, each competent authority shall use its best efforts, in accordance with the law, practice and procedure of the requested state, to make available to the competent authority of the other party relevant and material information, such as statements, depositions, documents, business records, correspondence or other material available to it concerning alleged violations of law as described above.

4. Upon request, each competent authority shall render, in accordance with the law, practice and procedures of the requested state, assistance to the competent authority of the requesting state, such as locating witnesses, interviewing of witnesses, taking testimony or statements or the production of documents or other materials. Representatives of the requesting competent authority may participate in the execution of the request if the competent authority of the requested state consents. Neither party shall be obligated as part of such assistance rendered pursuant to this Agreement to immunize any person from prosecution, or to utilize compulsory measures to secure such assistance.

5. Such information shall be used exclusively for purposes of investigation conducted by agencies of the parties with law enforcement responsibilities and in ensuring criminal, civil or administrative proceedings in which such agencies are participating.

6. Except as provided in paragraph "7," all information made available by the parties pursuant to these procedures, and all correspondence between the competent authorities of the parties relating to such information and to the implementation of these procedures, shall be kept confidential and shall not be disclosed to third parties or to government agencies having no law enforcement re-

sponsibilities. Disclosure to other agencies having law enforcement responsibilities shall be conditioned on the recipient agency's acceptance of the terms set forth in this Agreement. In the event of any breach of confidentiality the other party may discontinue cooperation under this Agreement.

7. Information made available pursuant to this Agreement may be used in any ensuing criminal, civil or administrative proceedings which take place in the requesting state and in which an agency having law enforcement responsibilities is a party. The competent authorities of the parties shall use their best efforts to furnish the information in such form as to render it admissible pursuant to the rules of evidence in the requesting state, including, but not limited to, certifications, authentications, and other such assistance as may be necessary to facilitate admissibility. With respect to the public disclosure of such information in criminal, civil and administrative proceedings, the parties shall give advance notice and afford an opportunity for consultation before the use of any information is made available pursuant to these procedures.

8. The parties shall use their best efforts to assist in the expeditious execution of letters rogatory issued by the judicial authorities in connection with any legal proceedings which take place in their respective states.

9. All assistance by a requested state will be performed subject to all limitations imposed by its domestic law. Execution of a request for assistance may be postponed, denied or made subject to conditions to be agreed upon, if the requested competent authority determines that execution would interfere with any ongoing investigation or legal proceeding in the requested state.

10. Nothing in this Agreement shall require a party to initiate or participate in pending or future litigation.

11. Nothing in this Agreement shall limit the rights of the parties to utilize for any purpose information obtained independently of these procedures.

12. Except as otherwise provided herein, the mutual assistance to be rendered by the parties pursuant to this Agreement is designed solely for the benefit of their respective agencies having law enforcement responsibilities, and is not intended to benefit third parties.

13. An extension of this Agreement to other investigations being conducted or contemplated by the parties may be accomplished by an exchange of letters between the parties.

14. This Agreement shall enter into force on the date of signature by both parties.

Done at Manila, this eleventh day of June, 1986

FOR THE REPUBLIC OF THE PHILIPPINES:

/s/ Jovito R. Salonga
FOR THE REPUBLIC OF THE
Government of the Republic
Chairman, Presidential
Commission on Good
of the Philippines

FOR THE UNITED STATES:

/s/ Victoria Toensing
Deputy Assistant Attorney
General, Criminal Division
United States Department
of Justice

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

IN RE: GRAND JURY 85-3,
IN RE: GRAND JURY 86-2
JOHN DOE 700

Filed *In Camera*, and
Under Seal

(BENJAMIN ROMUALDEZ)

DECLARATION

I, Theodore S. Greenberg, being employed as an Assistant United States Attorney for the Eastern District of Virginia since February 1977, and with the Department of Justice since October 1974, hereby state:

1. Your declarant is the Assistant United States Attorney in charge of the investigation in *John Doe No. 700* (Grand Juries 85-3 and 86-2) and has performed in such capacity since the commencement of this investigation in October 1984.

2. Since its inception in October 1974 [sic], *John Doe No. 700* has been an investigation inquiring into violations of federal criminal law relating to fraud against the United States Department of Defense, Defense Security Assstance Agency.

3. Benjamin Romualdez has been subpoenaed by the Grand Jury to testify and produce documents. Romualdez

is the former Philippine Ambassador to the United States.

4. This Declaration is filed in support of the Government's opposition to Benjamin Romualdez's motion to quash a grand jury subpoena directing his appearance before the grand jury on July 7, 1986 and his motion for a protective order. Both motions are based on his fear of prosecution by the Philippine government.

5. Romualdez's motions are predicated on the theory that the Eastern District of Virginia grand jury investigation is "proceeding in lockstep" (Romualdez Motion at 3) with the Philippine government's investigation and prosecution of Romualdez as evidenced by an amended complaint filed in Manila by the Philippine Presidential Commission on Good Government (PCGG) on April 28, 1986 against Romualdez and twenty-nine other individuals including President Ferdinand Marcos. Romualdez Motion Ex. 1. It appears that Romualdez contends that the Eastern District of Virginia Grand Jury is being used by the Philippine government as a surrogate investigator to obtain evidence the Philippine government needs to prosecute Romualdez and others. More particularly, Romauldez states in his motion (p. 14) that:

> . . . the United States is undisputably participating in a foreign prosecution, either actually or constructively. The very title of the Agreement [Agreement On Procedures For Mutual Legal Assistance] leaves no doubt that the investigation into [Romualdez's] activities from 1966 to 1986 represents a *joint venture* conducted by officials of both countries. The United States government is compelling testimony under a grant of immunity in an effort to extract incriminating evidence against petitioner which will be turned over to the Philippine government to aid in their prosecution of [Romualdez]. (emphasis added).

6. I am not a surrogate investigator for the Philippine government; and the Eastern District of Virginia Grand Jury is not being used to collect evidence for the Philippine government. The Eastern District of Virginia's investigation at issue was begun in October 1984 and is being conducted independent of any Philippine government investigation. At pertinent times prior to April 3, 1986 Romualdez was an official in the Philippine government. The investigation began long before President Marcos was deposed on February 26, 1986.

7. The complaint filed by the Philippine Commission on Good Government in Manila on April 28, 1986 against Benjamin Romualdez and others was filed by the Philippine government without consultation with or direction by me. My recollection is that I heard about the complaint for the first time when the filing of it was reported in the Manila newspapers. More importantly, at no time was I asked for, nor did I provide information to the Philippine government which was used as a basis for the complaint filed against Romualdez and the others.

8. I have not consulted with the PCGG on the scheduling of their proceedings (Romualdez Motion, Ex. 3) and I have taken no action based on the PCGG schedule.

9. I schedule grand jury appearances in the Eastern District of Virginia investigation based on the availability of the grand jury, my schedule and what investigative information is available to me. I did not schedule Romualdez's grand jury appearance based upon any thought or consideration of how that might aid or affect the PCGG investigation.

10. I was one of the draftsmen of the Agreement on Mutual Assistance entered into by and between the United States Department of Justice and the Philippine Commission on Good Government. Prior to finalizing the Agreement presented to the PCGG we consulted with others in the Department of Justice who are experts in

the area of mutual assistance agreements. I believe that Justice Department personnel have participated, in one form or another, in all of the mutual assistance agreements that have been entered into since the prototype, "Procedures for Mutual Assistance in Administration of Justice in Connection with Lockheed Aircraft Corporation Matter, Mar. 23, 1976, United States—Japan, 27 U.S.T. 946, T.I.A.S. No. 8233.[1]

11. By the terms of the Agreement on Mutual Assistance in this case, as in all the mutual assistance agreements entered into over the years with law enforcement agencies all over the world, the United States Department of Justice obligates itself to do only that which is permitted under United States law and practice.

12. The June 11, 1986 *Agreement on Procedures for Mutual Legal Assistance* makes it clear that information and evidence gathered by the United States will be disclosed to the Philippine government only in accordance with "the law, practice and procedure" of the United States. See Agreement ¶ 3. See also 28 U.S.C. 1781 and 1782 (which requires courts of the United States to assist foreign and international tribunals and litigants in gathering evidence in the United States pursuant to letters rogatory).

14. I have not violated and do not intend to violate Rule 6(e), Fed. R. Crim. Proc. or to fail to carry out my other duties as an Assistant United States Attorney.

15. I was one of three persons representing the United States Department of Justice when the Mutual Assistant Agreement was reviewed in Manila on June 10, 1986

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[1] Some, but not all of the agreements arising out of the Lockheed case are set forth in, *International Exchange of Information in Criminal Cases* p. 100 fn.23 (attached to our opposition papers). This article is found in *Transnational Aspects of Criminal Procedure* 1983 Michigan Yearbook of International Legal Studies (Clark Boardman). These and other mutual assistance agreements are published in *Treaties in Force.*

with officials of the Philippine Presidential Commission on Good Government. At no time during that meeting, or in meetings prior to or subsequent thereto, did any Philippine official request information from me relative to the activities of Benjamin Romualdez. Further, at no time have I asked the Philippine government or any entity thereof for information about or concerning Romualdez.

16. To ensure that the provisions of the Mutual Assistance Agreement are properly carried out, each party has designated special channels through which requests and information will pass. I am the Justice Department's sole contact point with regard to *John Doe 700* and it is through me that information relative to this investigation will be released and received. Of course, my superiors in the Department of Justice will be privy to and will participate in these matters.

17. Nothing in the record of this matter, or in the record relating to the Araneta contempt (*United States* v. *(Under Seal)*, No. 86-5572, Slip Op. (4th Cir. June 23, 1986), *reh. denied*, (July 3, 1986) remotely suggests that agents of the United States government have violated or intend to violate the laws of the United States, including Rule 6(e), Fed. R. Crim. Proc., or the practices and procedures of the Department of Justice governing the release of information gathered in the course of federal criminal investigations.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 6th day July, 1986.

/s/ Theodore S. Greenberg
Assistant United States Attorney

SUPREME COURT OF THE UNITED STATES

No. A-18

GREGORIO ARANETA, III and IRENE MARCOS ARANETA

v.

UNITED STATES

ON APPLICATION FOR STAY

[July 19, 1986]

CHIEF JUSTICE BURGER, Circuit Justice.

Applicants, a daughter and son-in-law of former President Ferdinand Marcos, ask that I stay a contempt order of the United States District Court for the Eastern District of Virginia requiring their incarceration if they fail to testify before a grand jury on July 22. They contend that requiring them to so testify would violate their Fifth Amendment privilege against self-incrimination because their testimony might be used against them in related criminal proceedings currently pending in the Philippines. They assert they will file a petition for certiorari on this issue.

Soon after their arrival in the United States, applicants were served with subpoenas requiring their testimony before a Grand Jury sitting in the Eastern District of Virginia to investigate alleged corruption relating to arms contracts made with the government of the Philippines. The District Court denied the applicants' motion to quash the subpoenas on Fifth Amendment grounds,

and granted instead the Government's motion to give the applicants use and derivative use immunity as to prosecutions in the United States. The court also entered a restrictive order designed to protect the secrecy of their testimony and held that no constitutional question was presented because the applicants had not demonstrated a real and substantial danger of prosecution abroad.

The Court of Appeals affirmed, but on different grounds. It acknowledged that applicants faced a substantial possibility of prosecution in the Philippines. It also found the District Court's restrictive order insufficient to protect against disclosures to the Philippine government because, *inter alia*, the order itself contemplates permitting disclosure of applicants' testimony at a future date, and because the order does not prohibit the United States from revealing evidence derived from that testimony. The court therefore reached the constitutional question, and held that the Fifth Amendment privilege is not violated simply because compelled testimony might be used in a foreign prosecution. The court denied rehearing on July 3.

The requirements for obtaining a stay pending certiorari are well established. Such a stay should be granted only when (1) there is a reasonable probability that four Justices will vote to grant certiorari; (2) there is a fair prospect that a majority of the Justices will find the decision below erroneous; and (3) a balancing of the equities weighs in the applicant's favor. *See, e.g., National Collegiate Athletic Association* v. *Board of Regents*, 463 U.S. 1311, 1313 (1983) (WHITE, J., in chambers); *Gregory-Portland Independent School District* v. *United States*, 448 U.S. 1342, 1342 (1980) (REHNQUIST, J., in chambers); *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (BRENNAN, J., in chambers). In assessing whether each of these factors has been met, a Circuit Justice acts as a "surrogate for the entire Court." *Holtzman* v. *Schlesinger*, 414 U.S. 1304, 1313 (1973) (MARSHALL, J., in chambers).

As to the first requirement, I conclude that four Justices will likely vote to grant certiorari on the issue that presumably will be presented in the applicant's petition, namely whether the privilege against self-incrimination protects a witness from being compelled to give testimony that may later be used against him in a foreign prosecution. Substantial confusion exists on this issue.* Moreover, this Court voted to consider the question in *Zicarelli* v. *New Jersey State Commission of Investigation*, 406 U.S. 472, 478 (1972), but did not reach it because, in the view of the majority, the appellant here "was never in real danger of being compelled to disclose information that might incriminate him under federal law," *id.* at 480. We did, however, reserve the issue, observing that if the appellant should later be questioned about "matters that might incriminate him under foreign law and pose a substantial risk of foreign prosecution, . . . , then a constitutional question will be squarely presented." *Id.*, at 481.

Against this background, it is more likely than not that at least five Justices will agree with the Court of Appeals that the applicants face the kind of risk found lacking in *Zicarelli*, and will therefore reach and decide the question reserved in that case. And although such matters cannot be predicted with certainty, I conclude there is a "fair prospect" that a majority of this Court will decide the issue in favor of the applicants. *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964), contains dictum which, carried to its logical conclusion, would support such an outcome. That case held only that the privilege against self-incrimination protects a witness against

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* Compare *Mishima* v. *United States*, 507 F. Supp. 131, 135 (Alaska 1981); *United States* v. *Trucis*, 89 F. R. D. 671, 673 (E.D. Pa. 1981); and *In re Cardassi*, 351 F. Supp. 1080, 1085-1086 (Conn. 1972); with *Parker* v. *United States*, 411 F.2d 1067, 1070 (CA 10 1969), vacated and dismissed as moot, 397 U.S. 96 (1970); and *Phoenix Assurance Co.* v. *Runck*, 317 N.W. 2d 402, 413 (N.D.), cert. denied, 459 U.S. 862 (1982).

compelled disclosures in state court which could be used against him in federal court or vice versa. However, the Court also discussed with apparent approval several English cases holding that the privilege protects a witness from disclosures which could be used against him in a foreign prosecution. *See id.*, at 58-63, 77; *United States of America* v. *McRae*, L. R., 3 Ch. App. 79 (1867); *Brownsword* v. *Edwards*, 2 Ves. sen. 243, 28 Eng. Rep. 157 (Ex. 1750); *East India Co. v. Campbell*, 1 Ves. sen. 246, 27 Eng. Rep. 1010 (Ex. 1749).

Finally, I conclude that the equities weigh in applicants' favor, particularly if the stay is appropriately conditioned. Applicants clearly will suffer irreparable injury if the Court of Appeals is right about the likelihood of prosecution and the inability of the District Court's restrictive order to prevent disclosure. Cf. *Garrison* v. *Hudson*, 468 U.S. 1301, 1302 (1984). If that secrecy order is enforceable under all circumstances, it may afford applicants protection should they later be extradited for trial in the Philippines; however, that will depend, in part, on what protection is afforded to accused persons under Philippine law.

The Government and the public plainly have a strong interest in moving forward expeditiously with a grand jury investigation, but on balance the risk of injury to the applicants could well be irreparable and the injury to the Government will likely be no more than the inconvenience of delay. Accordingly, I granted the stay, conditioned upon applicants' filing their petition for certiorari by August 5, 1986. This should permit the Court to act on the petition during its first conference of the coming Term.

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 86-5572

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

(UNDER SEAL),
Defendants-Appellants.

Argued June 5, 1986.

Decided June 18, 1986.

Opinion Issued June 23, 1986.

John M. Bray (Cary M. Feldman, Douglas C. McAllister, Schwalb, Donnenfeld, Bray & Silbert, Washington, D.C., on brief), for defendants-appellants.

Theodore Stewart Greenberg, Asst. U.S. Atty., Alexandria, Va., and David B. Smith, Trial Atty. Washington, D.C., (Justin W. Williams, U.S. Atty., Alexandria, Va. on brief), for plaintiff-appellee.

Before WINTER, Chief Judge, and WIDENER and PHILLIPS, Circuit Judges.

HARRISON L. WINTER, Chief Judge:

Petitioners appeal from an order holding them in contempt for refusing to testify and to respond to a subpoena *duces tecum* before a grand jury, following a statutory grant of use and derivative use immunity. They

contend that the Fifth Amendment affords them the privilege not to testify in the United States, because their testimony could be used to incriminate them in a pending prosecution in the Philippines.

The district court denied petitioners' motion to quash their subpoenas on the basis of the Fifth Amendment, granting instead the government's motion that petitioners be shielded from prosecution in this country by use and derivative use immunity. When petitioners persisted in their refusal to comply with the subpoena, the district court adjudged them in contempt and sentenced them to a period of incarceration to end either when they purged themselves of their contempt or when the term of the grand jury expired. In addition, the court entered a restrictive order with respect to the safekeeping and use of transcripts, records and notes of testimony they might give in response to the subpoenas. Finally, the district court stayed the beginning of sentence for thirty days on condition that petitioners not leave or travel outside the United States.

We affirm.

I.

A grand jury in the Eastern District of Virginia was investigating possible corruption in arms contracts with the Philippines when petitioners, Irene Araneta and her husband Gregorio Araneta, III, respectively the daughter and son-in-law of Ferdinand E. Marcos, former President of the Philippines, came to the United States aboard an aircraft of the United States Air Force.[1] After their arrival in the United States, the Solicitor General of the

[1] In a case of this nature we would ordinarily not disclose the identity of the grand jury which had issued subpoenas or the identity of the persons contesting them. We do so here both because this information is already in the public domain purportedly as a result of disclosure by Mrs. Marcos and because the facts raising the unique legal issue would make identification an easy matter. It is also for these reasons that we did not hear argument *in camera*.

Philippines filed criminal charges against the Aranetas alleging the crimes of conspiracy and violations of the Anti-Graft and Corrupt Practices Act and Articles 210-221 of the Philippines Penal Code during the period 1966 until their departure on February 26, 1986. Approximately two months after their entry into the United States, the Aranetas, having been served with the grand jury subpoenas, appeared before the district court in connection with their motion to quash and the government's motion, pursuant to 18 U.S.C. §§ 6002 and 6003, to immunize them. The district court denied their motion, granted the government's motion and ordered them to testify. When they advised the court that they would persist in asserting the Fifth Amendment privilege and refusing to testify, the district court entered the order finding them in contempt, imposing punishment and protecting their testimony when and if given. The order was entered May 20, 1986.

The United States and the Republic of the Philippines have negotiated and entered into an extradition treaty, dated November 27, 1981. The treaty has not, however, received Senate ratification. By its terms, the treaty applies to certain offenses "committed before as well as after the date this Treaty enters into force." An affidavit of the United States Under Secretary of State for Political Affairs, who is responsible for, *inter alia*, formulating and executing United States foreign policy regarding the Republic of the Philippines, indicates the extreme importance the United States attaches to favorable relations with the Phillipines and declares that it is the policy of the United States to strengthen and broaden those relations. Further, the affidavit shows that the United States has, at the request of the government headed by President Corazon Aquino, agreed to supply the government of the Philippines with an inventory and copies of documents held by U.S. Customs officials, obtained from President Marcos and members of his party when they arrived in Honolulu, Hawaii on February 26, 1986. The

United States undertakes this obligation in order to assist the Philippine government in determining whether valuables and documents brought to the United States by former President Marcos were taken unlawfully and places a high priority on fulfilling this commitment. Finally, the affidavit recites that the Aquino government has established a presidential commission to seek recovery of property and assets claimed by the Republic of the Philippines and that the affiant "strongly believe[s] that it is in the foreign policy interests of the U.S. government to honor the Philippine Government's request [to assist the chairman of the commission in securing access to the documents being held by Customs] and our commitment to fulfill it at the earliest possible time."

After argument of this appeal, one of the lawyers in this case supplied us with a newspaper account reporting that on June 11, 1986, one week after the argument of this case, the United States and the Philippines entered into an agreement on procedures for mutual legal assistance. The accord commits the two signatories to share evidence in the legal investigations of specific corporations and individuals alleged to have provided kickbacks to obtain military and public works contracts, including a $2.1 billion nuclear power plant project. The two governments have also agreed to assist each other in arranging interviews with potential witnesses and locating additional evidence.

Petitioners and other members of the Marcos party are lawfully present in the United States under advanced parole status pursuant to 8 U.S.C. § 1182(d)(5).[2] In

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[2] (5)(A) The Attorney General may, except as provided in subparagraph (B), in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergency reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion

essence, they are present, but not admitted, and may be returned to the Philippines in the discretion of the Attorney General when he determines that their presence no longer serves the public interest.

II.

The Aranetas were granted statutory use and derivative use immunity pursuant to 18 U.S.C. §§ 6002 and 6003, and they concede that this satisfactorily replaces their Fifth Amendment privilege against self-incrimination under the laws of the United States. *See Zicarelli* v. *Investigation Commission*, 406 U.S. 472 (1972); *Kastigar* v. *United States*, 406 U.S. 441 (1972); *Ullman* v. *United States*, 350 U.S. 422 (1956); *Brown* v. *Walker*, 161 U.S. 591 (1896). Instead, they argue that their right not to incriminate themselves has extra-territorial effect, in, that they have a right to refuse to testify in the United States if their testimony could be used to incriminate them under the laws of a foreign jurisdiction, here the laws of the Republic of the Philippines.

No authority controls our resolution of this issue, but *Zicarelli* v. *Investigation Commission*, 406 U.S. 472 (1972) provides the framework for our inquiry.[3] *Zicarelli*

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of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

(B) The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require than the alien be paroled into the United States rather than be admitted as a refugee under section 1157 of this title.

[3] In *Zicarelli*, the Supreme Court granted *certiorari* to determine whether the Fifth Amendment precludes the compulsion of testi-

teaches that a court should first determine that the witness confronts a "real and substantial" risk of foreign prosecution before proceeding to consider whether that witness, if fully immunized under domestic law, may assert a Fifth Amendment privilege on that basis. Accordingly, we first address the degree of danger that the Aranetas will be prosecuted in the Philippines.

While we cannot say with absolute certainty that the Aranetas will face foreign prosecution, we must proceed to the constitutional question if petitioners demonstrate a real and substantial danger of prosecution abroad. Here, petitioners have shown an objectively reasonable expectation of prosecution in the Philippines.

Our conclusion draws support from a method of analysis developed by the Second Circuit, which has addressed this question on several recent occasions. *In re Grand Jury Proceedings*, 748 F.2d 100, 103 (2 Cir. 1984); *In re Gilboe*, 699 F.2d 71, (2 Cir.1983); *In re Grand Jury Subpoena of Flanagan*, 691 F.2d 116, 121 (2 Cir.1982). The *Flanagan* court assembled a series of factors to determine whether a witness faces a cognizable danger of prosecution:

> Whether there is an existing or potential foreign prosecution of him; what foreign charges could be filed against him; whether prosecution of them would be initiated or furthered by his testimony; whether any such charges would entitle the foreign jurisdiction to have him extradicted from the United States;

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mony that could be used to incriminate the witness in the courts of another country. 401 U.S. 933 (1971). The Court ultimately found it unnecessary to decide the issue because Zicarelli failed to establish "a real and substantial fear of foreign prosecution." 406 U.S. at 478. Because the witness could clearly have confined his testimony to areas of interest to domestic law enforcement officials, his fear of foreign prosecution was at best "remote and speculative," obviating the need for any Fifth Amendment protection.

> and whether there is a likelihood that his testimony given here would be disclosed to the foreign government.

691 F.2d at 121. Assessing these factors, we are persuaded that petitioners' fear of prosecution is real and substantial, rather than speculative and remote.

We begin by noting that the government of the Philippines has begun a prosecution against the Aranetas on charges congruent with the subjects comprising the grand jury investigation. Petitioners can reasonably expect to be interrogated on these subjects before the grand jury, raising the very real possibility that petitioners' testimony, or the fruits thereof, would prove useful in the pending prosecution. The government does not dispute this.

Essentially, the likelihood of foreign prosecution really depends on the likelihood that the Aranetas will find themselves under the jurisdiction of the Philippine government either voluntarily or otherwise. In their brief, the Aranetas suggest the possibility that they "may voluntarily choose to return to their country at a future date." Even though they may not return voluntarily, it is not remote or speculative that they may be returned involuntarily. Although the United States is not presently bound by an extradition treaty, such a treaty has been negotiated and signed, subject only to Senate ratification. While the record does not show whether the treaty has been submitted to the Senate, or whether the Senate has simply failed to act, the record clearly reflects the policy of our government to aid and assist the Aquino government in its pursuit of Philippine interests with respect to the Marcos regime. Given this unequivocal commitment, we do not deem either remote or speculative the possibility that, should the Aquino government request the return of the Aranetas and others, the treaty will be ratified, and a request for extradition will be honored.

Even short of ratification of the extradition treaty, the possibility that the Aranetas may be returned to the Philippines is neither remote nor speculative for an additional reason. Petitioners' continued presence in the United States depends wholly on the discretionary authority of the Attorney General. That discretion may be exercised at any time to revoke their right to be present. If revoked, the Aranetas may seek political asylum, and if that is denied, judicial review of the denial. But they would bear a heavy burden in seeking to overturn such denial, and although they might be successful in delaying exclusion, we cannot assume that they would easily prevail on the merits. Again because of the demonstration in the record of the present policy of the United States to aid and assist the present government of the Philippines, we think that there is a substantial likelihood that, if requested by the Aquino government, the Attorney General would revoke the permission of the Aranetas to be present in the United States, and it is not likely that they would be granted political asylum. If that permission to remain in the United States is revoked, there is no question but that the Philippines is the only place to which they may be sent.

Finally, we must determine whether the protective order entered by the district court so reduces the possibility of disclosure as to render inconsequential the risk that the Aranetas' grand jury testimony will be used against them in the Philippines.

The district court, in ordering the Aranetas to testify under a grant of immunity, included provisions pursuant to Fed.R.Crim.P. 6(e) to limit disclosure of any testimony given by them. The order seals the notes and records of petitioners' testimony and provides that no part shall be released except upon court order, the petition therefore to specify to whom it is to be released and the reasons for the release. Access to the testimony is limited to eight federal prosecutorial officials; those persons, and any person receiving any part of the testimony,

are ordered not to divulge any portion to any other person or any foreign government. In addition, the government must maintain a record of the release of ?ing to whom the release is made, the date of release and the date of return. Finally, the order provides that any application for release and the record of any hearing thereon be under seal, and it warns that any violation of the order may be punished as a contempt of court.

The government argues that this order obviates the Aranetas' concern that their immunized testimony might be used against them in a prosecution by the Philippine government, thus precluding the assertion of a Fifth Amendment privilege. The government concedes, however, that it wishes to preserve the option of seeking a court order permitting disclosure to the Philippine authorities, should it be in the interest of the United States to do so.

While some authority holds that a Rule or order may adequately protect against the likelihood of disclosure of grand jury testimony to a foreign government, *see, eg,* In re Nigro, 705 F.2d 1224, 1227 (10 Cir.1982), *cert. denied,* 461 U.S. 927, 103 *S.Ct.* 2087, 77 L.Ed.2d 298 (1983); *In re Baird,* 668 F.2d 432 (8 Cir.1982); *In re Tierney,* 465 F.2d 806 (5 Cir.1972), the facts of this case prove the contrary authority to be more compelling. The allegation against the Marcos family and the strategic importance of American relations with the Philippines have excited an unusual degree of public interest. This is not a simple case charging a garden variety of criminal conduct. Rather, this case involves a former head of state, whose alleged illicit gains are measurable only by the billions of dollars.

We do not suggest that a government official would knowingly violate the order of the district court, but we will not blind ourselves to the tensions that the case has generated which may give rise to an inadvertent disclosure. Moreover, the order protects only against the

disclosure of *testimony*; it does not prohibit the United States from revealing evidence *derived from* the testimony at issue. *Cf. Kastigar, supra.* Certainly the order does not and cannot provide any mechanism to detect a disclosure no matter how inadvertent, and if a disclosure is made, the courts of the United States are powerless to restore secrecy once it is lost. The order also contemplates permitting disclosure at a future date, and we can conceive that court-permitted disclosure may be proper in a number of circumstances. Finally, should the Aranetas testify before the grand jury, and should the grand jury return an indictment, the Aranetas could be called as witnesses at the ensuring trial.

All of these reasons lead us to conclude that the Rule 6(e) order is not adequate to ensure that the testimony of the Aranetas will not be disclosed to the Philippine government. We therefore align ourselves with those courts that have ruled that such an order is not conclusive with respect to possible disclosure. *See In re Grand Jury Proceedings*, 748 F.2d 100, 103-04 (2 Cir. 1984); *In re Flanagan*, 691 F.2d 116, 123-24 (2 Cir.1982); *In re Federal Grand Jury Witness*, 597 F.2d 1166, 1168-69 (9 Cir. 1979) (Hufstedler, J., concurring); *In re Cardassi*, 351 F.Supp. 1080 (D. Conn.1972). We conclude that the Rule 6(e) order cannot reduce the risk of self-incrimination adequately to obviate the necessity of our determining the reach of the Fifth Amendment.

In sum, we are persuaded that the risk of actual prosecution in the Philippines is sufficiently great that we should address the constitutional issue.

III.

By its terms, the Fifth Amendment [4] does not purport to have effect in foreign countries; and ordinarily, unless specifically stated otherwise, a provision of domestic

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[4] No person . . . shall be compelled in any criminal case to be a witness against himself. . .

law, statutory or constitutional, is deemed to apply only to the jurisdiction which enacts it. Thus it seems quite certain that the Fifth Amendment would not prohibit the use of compelled self-incriminatory evidence in a Philippine prosecution if Philippine law countenanced its use. See *Rosado* v. *Civiletti*, 621 F.2d 1119, 1129 (2 Cir.), *cert. denied*, 449 U.S. 856, 101 S.Ct. 153, 66 L.Ed.2d 70 (1980).

To determine whether the Fifth Amendment protects from compelled self-incrimination a witness immunized under domestic law but exposed to a substantial risk of foreign prosecution, we reason by analogy to the extension of the Fifth Amendment to prosecutions under state law. When the Fifth Amendment was applied only to the federal government, the Supreme Court held that the protection it afforded did not forbid the United States from compelling testimony from a witness that would incriminate him under state law, *United States* v. *Murdock*, 284 U.S. 141, 52 S.Ct. 63, 76 L.Ed. 210 (1931), nor did it forbid a state government from compelling testimony that would incriminate under federal law, *Knapp* v. *Schweitzer*, 357 U.S. 371, 78 S.Ct. 1302, 2 L.Ed.2d 1393 (1958). Only when the Fifth Amendment was held applicable to the states, *Malloy* v. *Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964), was the privilege held to protect a witness in state or federal court from incriminating himself under either federal or state law. *See Murphy* v. *Waterfront Commission, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed. 2d 678 (1964).*

From this history, we conclude that the Fifth Amendment privilege applies only where the sovereign compelling the testimony and the sovereign using the testimony are both restrained by the Fifth Amendment from compelling self-incrimination. *See*, Note, The Reach Of The Fifth Amendment Privilege When Domestically Compelled Testimony May Be Used in A Foreign Country's Court, 69 Va.L.Rev. 875 (1983). Since the Fifth Amendment would not prohibit the use of compelled incriminating testimony in a Philippine court, it affords an im-

munized witness no privilege not to testify before a federal grand jury on the ground that his testimony will incriminate him under Philippine law.

The privilege against compulsory self-incrimination serves a dual purpose. It protects individual dignity and conscience, and it preserves the accusatorial nature of our system of criminal justice. In *Murphy, supra,* the Court enumerated the values and aspirations underlying the Fifth Amendment:

> our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown by disturbing him and by requiring the government in its contest with the individual to shoulder the entire load."

378 U.S. at 55, 84 S.Ct. at 1596 (citations omitted). Our decision that the Aranetas cannot find shelter in the Fifth Amendment does not imperil these values. Insofar as the privilege exists to promote the criminal justice system established by our Constitution, it can have no application to a prosecution by a foreign sovereign not similarly constrained. Comity among nations dictates that the United States not intrude into the law enforcement activities of other countries conducted abroad. With regard to insulating the individual from the moral hazards of self-incrimination, perjury or contempt, the United States has done everything in its power to relieve the pressure by granting the Aranetas use and derivative use immunity. Just as comity among nations requires the United States to respect the law enforcement processes of other nations, our own national sovereignty

would be compromised if our system of criminal justice were made to depend on the action of foreign government beyond our control. It would be intolerable to require the United States to forego evidence legitimately within its reach solely because a foreign power could deploy this evidence in a fashion not permitted within this country. Our conclusion in this respect is reinforced by the authorities that hold, as a matter of domestic law, that the Fifth Amendment privilege does not protect the witness against *all* adverse uses of his compelled testimony but only those adverse uses specifically proscribed by the Fifth Amendment. *See Peimonte* v. *United States*, 367 U.S. 556, 559-61, 81 S.Ct. 1720, 1722-23, 6 L.Ed.2d 1028 (1961); *Brown* v. *Walker*, 161 U.S. 591, 597-98, 605-06, 16 S.Ct. 644, 647, 650, 40 L.Ed. 819 (1896); *Ryan* v. *C.I.R.*, 568 F.2d 531, 541-42 (7 Cir. 1977), *cert. denied*, 439 U.S. 820, 99 S.Ct. 84, 58 L.Ed.2d 111 (1978); *In re Daley*, 549 F.2d 469 (7 Cir.), *cert. denied*, 434 U.S. 829, 98 S.Ct. 110, 54 L.Ed.2d 89 (1977); *Childs* v. *McCord*, 420 F.Supp. 428 (D. Md. 1976), *aff'd*, 556 F.2d 1178 (4 Cir. 1977). Our conclusion also accords with the holdings in *In re Parker*, 411 F.2d 1087, 1070 (10 Cir. 1969), *vacated as moot*, 397 U.S. 96, 90 S.Ct. 819, 25 L.Ed.2d 81 (1970); and *Phoenix Assurance Co. of Canada* v. *Runck*, 317 N.W.2d 402 (N.D.), *cert. denied*, 459 U.S. 862, 103 S.Ct. 137, 74 L.Ed.2d 117 (1982).

We reject petitioners' contention that *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964) provides authority for us to hold that the Fifth Amendment does protect against self-incrimination under foreign law.[5] In *Murphy*, the Su-

[5] Some courts have adopted this thesis. *Mishima* v. *United States*, 507 F. Supp. 131 (D. Alaska 1981); *United States* v. *Tracis*, 89 F.R.D. 671 (E.D. Pa. 1981); *In re Cardassi*, 351 F. Supp. 1080 (D. Conn. 1972). The Aranetas also argue that the several decisions, including *Zicarelli* v. *Investigation Commission*, *supra*, holding that a witness failed to demonstrate a real and substantial danger of foreign prosecution have as their underlying premise

preme Court first held that the Fifth Amendment protects a witness against self-incrimination under state and federal law if either jurisdiction compels his testimony. In arriving at this result, Mr. Justice Goldberg discussed English law dealing with the subject, concluding that English law provides protection against self-incrimination under foreign law. The Court's scholarship with respect to English law in this regard has been attacked, *see* Note, 69 Va.L.Rev. at 893-94, and the present English rule *not* to recognize such protection was enacted by Parliament in the Civil Evidence Act of 1968. We do not enter the dispute as to whether *Murphy* represents a correct statement of the English rule at a particular time because we do not think that the *Murphy* holding depended upon the correctness of the Court's understanding of the state of English law and reliance thereon as the sole basis for decision. Rather, *Murphy* proceeds as a logical consequence to the holding in *Malloy* v. *Hogan*, *supra*, that the Fifth Amendment privilege against self-incrimination is fully applicable to the states. *Zicarelli* shows that the English rule, even if it in fact protected against self-incrimination in a foreign jurisdiction was not the basis of decision in *Murphy*. *Zicarelli* was decided on the ground that the witness had not shown that he was in real danger of being compelled to disclose information that might incriminate him under foreign law. Significantly, the Court added:

> Should the Commission inquire into matters that might incriminate him under foreign law and pose a substantial risk of foreign prosecution, and should such inquiry be sustained over a relevancy objection,

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that the privilege would apply if a real and substantial danger of foreign prosecution were established. We cannot read those cases in that manner. We think they proceed only with healthy regard for the principle that constitutional issues not be decided unnecessarily. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 298, 346-47, 56 S.Ct. 496, 482-83, 80 L.Ed. 688 (1936) (Brendeis, J., concurring).

> then a constitutional question will be squarely presented. We do not believe that the record in this case presents such a question.

406 U.S. at 481, 92 S.Ct. at 1676 (footnote omitted). We understand this language to indicate that, as far as the Supreme Court is concerned, the question before us remains an open one. Had it been decided in *Murphy* that the privilege extended to foreign prosecutions, the quoted language in *Zicarelli* would have been unnecessary and *Zicarelli* could have been more simply decided on the settled principle that the privilege extended to testimony that could incriminate the witness under foreign law.

Fully mindful of our obligation to decide only the case before us, we nevertheless feel compelled to note what is not at issue in this case. First, there has been no attempt to show that the United States inspired, instigated or controls the Philippine prosecution. *See United States* v. *Emery*, 591 F.2d 1266, 1267-68 (9 Cir. 1978) (suppressing inculpatory statements made while defendant was in custody of Mexican authorities, where American DEA agents participated by alerting their Mexican counterparts of defendant's wrongdoing, coordinating surveillance, supplying personnel and giving signal triggering arrest); *cf. Lustig* v. *United States*, 338 U.S. 74, 69 S.Ct. 1372, 93 L.Ed. 1819 (1949) (suppressing evidence produced by joint venture of federal and local officers prior to incorporation of Fourth Amendment); *Byars* v. *United States*, 273 U.S. 28, 47 S.Ct. 248, 71 L.Ed. 520 (1927) (suppressing evidence obtained by federal prohibition agent while assisting local police in search authorized by warrant insufficient under federal constitutional law); *United States* v. *Hensel*, 699 F.2d 18 (1 Cir.), *cert. denied*, 461 U.S. 958, 103 S.Ct. 2431, 77 L.Ed. 1317 (1983) (evidence seized by foreign authorities excluded if (a) circumstances surrounding search and seizure shock judicial conscience; (b) American officials participated in search; or (c) foreign authorities

conducting search acted as agents for their American counterparts); *United States* v. *Rose*, 570 F.2d 1358 (9 Cir.1978) (same); *United States* v. *Morrow*, 537 F.2d 120 (5 Cir. 1976) (same); *Stonehill* v. *United States*, 405 F.2d 738 (9 Cir. 1968), *cert. denied*, 395 U.S. 960, 89 S.Ct. 2102, 23 L.Ed.2d 747 (1969) (same). In addition, petitioners have not suggested that the United States, in compelling their testimony under a grant of immunity, pursues no legitimate purpose of its own, even if it also has an intention to assist a foreign government whose continued good will is of great strategic importance. In short, petitioners have not presented to us a claim of American participation in a foreign prosecution, either actually, through a joint venture with foreign law enforcement officials, or constructively, by means of employing such individuals as agents. The case before us does not require us to address either of these factual patterns, as we expressed no views on them at this time.

AFFIRMED.[6]

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[6] Because the government has not appealed, we have no occasion to consider whether the district court's protective order should be modified in the light of the views that we have expressed. Our affirmance is without prejudice to the right of either party to seek modifications from the district court and without limitation on the district court's discretionary authority to modify for what it deems good cause shown.

(2)

No. 87-34

In the Supreme Court of the United States

OCTOBER TERM, 1987

FERDINAND E. MARCOS AND
IMELDA R. MARCOS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a foreign state can waive head-of-state immunity for a former ruler.

2. Whether petitioners may assert privileges allegedly available under Philippine law as a ground for refusing to produce documents subpoenaed by a federal grand jury.

3. Whether petitioners may assert their Fifth Amendment privilege, despite a grant of act-of-production immunity, and refuse to turn over documents subpoenaed by a grand jury.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 817 F.2d 1108. The order of the district court (Pet. App. 11a-12a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1987, and the petition for a writ of certiorari was filed on July 6, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners were held in civil contempt in the United States District Court for the Eastern District of Virginia for refusing to comply with a subpoena duces tecum issued by a grand jury. The court of appeals affirmed.[1]

1. Petitioners are the former President of the Philippines and his wife. In early 1986, Corazon Aquino replaced petitioner Ferdinand Marcos as President. Petitioners entered the United States on February 26, 1986, aboard a United States Air Force plane. They have been granted parole status in the United States pursuant to 8 U.S.C. 1182(d)(5). After petitioners left the Philippines, the Solicitor General of the Philippines filed criminal charges against them, alleging, inter alia, conspiracy and violations of the Anti-Graft and Corrupt Practices Act and Articles 210-221 of the Philippine Penal Code.

At the time petitioners arrived in this country, a federal grand jury in the Eastern District of Virginia was investigating possible corruption in arms contracts with the Philippines.[2] In January 1987, petitioners were each served with subpoenas compelling them to produce before the grand jury specified documents that they held in a custodial and individual capacity (E.R. 1-11).[3] Petitioners filed a motion to

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[1] The court of appeals stayed its mandate pending the filing of this petition. Pet. App. 10a.

[2] The investigation began in October 1984, while petitioner Ferdinand Marcos was still President of the Philippines (Pet. App. 19a).

[3] "E.R." refers to the Excerpts of Record filed in the court of appeals.

quash the subpoenas on the ground that they were shielded from compulsory process under the doctrine of head-of-state immunity and the privilege against compulsory self-incrimination in the Philippine and the United States Constitutions. On February 3, 1987, the Aquino government formally waived "any residual sovereign, head of state, or diplomatic immunity [petitioners] may enjoy under international and U.S. law * * * by virtue of their former offices in the Government of the Philippines" (Pet. App. 13a). Without appearing before the grand jury, petitioners submitted the documents required by the subpoenas to the exclusive custody of the district court pending "the ultimate judicial resolution of [petitioners'] claims of privileges and immunities with respect to th[e] documents" (E.R. 112-114).[4]

2. The district court denied petitioners' motion to quash the subpoenas. Pet. App. 11a. Upon the government's motion, the district court then gave petitioners act-of-production immunity under 18 U.S.C. 6002-6003 with respect to the production of documents other than Philippine government documents. When counsel for petitioners informed the court that petitioners would nevertheless withhold the documents from the grand jury (E.R. 229, 331), the court held petitioners in civil contempt pursuant to 28 U.S.C. 1826(a) and ordered that they be confined. The confinement order was stayed pending the resolution of petitioners' appeal. Pet. App. 11a-12a.

3. The court of appeals affirmed. First, the court rejected petitioners' claim that they were entitled to head-of-state immunity, holding instead that the

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[4] The district court sealed the documents, denying access to anyone until the outcome of this litigation (Pet. App. 3a n.*).

waiver submitted by the government of the Philippines should be given full effect. As the court explained (Pet. App. 4a-5a):

> Head-of-state immunity is founded on the need for comity among nations and respect for the sovereignty of other nations; it should apply only when it serves those goals. In this case, application of the doctrine [to petitioners] would clearly offend the present Philippine government, which has sought to waive [petitioners'] immunity, and would therefore undermine the international comity that the immunity doctrine is designed to promote. * * * [H]ead-of-state immunity is primarily an attribute of state sovereignty, not an individual right. Respect for Philippine sovereignty requires us to honor the Philippine government's revocation of the head-of-state immunity of [petitioners].

The court noted that pursuant to the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 32(1), 23 U.S.T. 3241, foreign states can waive diplomatic immunity for their diplomatic agents. It would be anomalous, the court concluded, "if a state had the power to revoke diplomatic immunity but not head-of-state immunity." Pet. App. 5a.

The court also rejected petitioners' claim that 28 U.S.C. 1782(a) forbids the government from compelling petitioners to give evidence to the grand jury in violation of the Philippine privilege against compulsory self-incrimination. The court noted (Pet. App. 7a-8a) that that statute applies only to testimony taken pursuant to letters rogatory issued by a foreign or international tribunal, while the contested subpoenas were issued as part of a grand jury in-

vestigation that began before petitioners arrived in the United States. The court found (Pet. App. 8a) that there was no evidence that the Philippine government issued letters rogatory or otherwise requested that the subpoenas issue.

Finally, the court of appeals held that the Fifth Amendment privilege against compulsory self-incrimination could not be invoked to block the production of documents despite the grant of act-of-production immunity, whether or not that immunity will shield petitioners from prosecution in the Philippines. The court reaffirmed its prior ruling in *United States* v. *Under Seal (Araneta)*, 794 F.2d 920, 925-928 (4th Cir. 1986), cert. denied, No. 86-172 (Oct. 6, 1986), that the "Fifth Amendment privilege against self-incrimination provides no protection from self-incrimination under foreign law." Pet. App. 8a.

ARGUMENT

1. Petitioners first contend (Pet. 6-15) that the current government of the Philippines cannot waive petitioners' head-of-state immunity. As petitioners concede, no other United States court has addressed the question whether a foreign state can waive head-of-state immunity for a former ruler (Pet. 7). The issue is therefore plainly not a recurring one. For that reason alone, petitioners' claim does not deserve the attention of this Court. In any event, the decision below is correct.

Petitioners cite no constitutional or statutory source for their claim of head-of-state immunity.[5] To the

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[5] We note at the outset that head-of-state immunity would not extend to petitioner Imelda Marcos. At most, she would be entitled to diplomatic immunity; petitioners do not claim

extent that head-of-state immunity exists, it is no broader than the sovereign immunity generally accorded foreign states. See Note, *Resolving the Confusion Over Head of State Immunity: The Defined Rights of Kings*, 86 Colum. L. Rev. 169, 171 (1986) (noting that the courts have not treated head-of-state immunity as distinct from sovereign immunity). Any immunity enjoyed by a present or former head of state inheres exclusively in the foreign sovereign, and not in the individual.[6] Restatement (Second) of Foreign Relations Law § 66, at 201 (1965). The recognition of foreign sovereign immunity is a matter of grace and comity on the part of the United States; it is not constitutionally mandated. *Verlinden B.V.* v. *Central Bank*, 461 U.S. 480, 486 (1983).[7] The question whether a particular sovereign is required to

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in this Court that diplomatic immunity cannot be waived by a foreign state. See page 7, *infra*.

[6] Individual officers of a foreign government may invoke sovereign immunity only for acts done in the exercise of governmental authority. *Underhill* v. *Hernandez*, 168 U.S. 250, 254 (1897). Thus, a former head of state has no immunity for acts undertaken for his private financial benefit. *Jimenez* v. *Aristeguieta*, 311 F.2d 547, 557-558 (5th Cir. 1962).

[7] Petitioners err in stating (Pet. 14) that the purpose of head-of-state immunity is to preserve the proper functioning of the foreign government. Rather, its purpose is to advance foreign relations by showing respect for the actions taken by friendly governments. Sovereign immunity, of which head-of-state immunity is a part, is founded solely on notions of comity. The cases cited by petitioners in support of their assertion have nothing to do with sovereign immunity, head-of-state immunity, or diplomatic immunity. See *Spalding* v. *Vilas*, 161 U.S. 483, 498 (1896); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 745 (1982).

submit to the jurisdiction of the United States courts was until recently a matter committed to the Executive Branch, which conducts foreign relations (*id.* at 486); *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 35-36 (1945). In 1976, however, Congress defined the scope of sovereign immunity in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602-1611. Pursuant to that Act, there is no sovereign immunity "in any case * * * in which the foreign state has waived its immunity either explicitly or by implication" (28 U.S.C. 1605(a)).

Diplomatic immunity can also be waived. Although it has no constitutional or statutory basis, diplomatic immunity is recognized in international law. See Vienna Convention on Diplomatic Relations, *supra*. In the United States, it generally shields a foreign state's diplomats from criminal and civil liability for acts done in this country. But there is no question that the foreign state can waive diplomatic immunity, thereby subjecting one of its agents to the jurisdiction of the United States courts. *Id.* art. 32(1).

Since the government of the Philippines can waive sovereign immunity and diplomatic immunity, it likewise can waive head-of-state immunity. Petitioners advance no sound justification for treating head-of-state immunity differently from sovereign and diplomatic immunity. Accordingly, the court below correctly held that petitioners were not immune from giving evidence to the grand jury merely by virtue of their former status as President and First Lady of the Philippines.

Contrary to petitioners' claim (Pet. 7-8), recognition of the waiver filed by the Philippine government will not "undermine U.S. international relations and lead to attempted interference by other nations with

the immunities accorded under U.S. law to our own former heads of state." First, as the court of appeals observed (Pet. App. 5a), "[r]espect for Philippine sovereignty requires us to honor the Philippine government's revocation of the head-of-state immunity" for petitioners. International relations will therefore be advanced, not impeded, by accepting the waiver. Similarly, recognizing the decision of the Philippine government to waive petitioners' immunity can scarcely lead to foreign interference with the immunities of former United States Presidents. Instead, accepting the Philippine government's waiver simply establishes the precedent that waiver decisions are the prerogative of the government affected. Just as the Philippine government can decide whether petitioners should be granted immunity, so the United States government can decide whether former United States Presidents are to be granted immunity.[8] Petitioners do not explain their assertion (Pet. 8) that accepting the waiver could "embarrass the United States in its international relations [by denying] * * * flexibility to deal with unexpected shifts in foreign political alignments." We are aware of no potential "embarrassment"; the grand jury investigation that generated the disputed subpoenas was clearly not instigated by the current Philippine government, since the grand jury investigation was initiated in October 1984, while petitioner Ferdinand Marcos was still President. That investigation is not politically motivated; it is entirely independent of the political situation in the Philippines. The Department of Jus-

[8] Indeed, petitioners' position, that immunity decisions are for the state in which the proceeding is held, is far more likely to undermine any protections available to former United States Presidents.

tice, in conjunction with the grand jury, retains the discretion to choose which persons and actions should be investigated and prosecuted in this country. Recognition of the Philippine government's decision to waive any residual head-of-state or diplomatic immunity petitioners might otherwise have may facilitate an appropriately authorized domestic United States investigation, but the Philippine government certainly cannot either instigate or terminate such an investigation.

Finally, petitioners attempt to draw support for their claim of head-of-state immunity from cases in which a United States President sought to claim some sort of immunity. See, *e.g.*, *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982) (immunity from civil liability predicated on official acts); *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977) (presidential privilege). But not even a former President of the United States enjoys the broad immunity claimed by petitioners. Indeed, as a general rule, our President must comply with subpoenas to produce relevant evidence in a criminal case. *Nixon* v. *Fitzgerald*, 457 U.S. at 760 (Burger, C.J., concurring); *United States* v. *Nixon*, 418 U.S. 683, 705-713 (1974) ("[t]he generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial" (*id.* at 713)). Clearly, petitioner Ferdinand Marcos is entitled to no greater immunity in United States courts by virtue of his position than is a President of the United States. In short, petitioners' former positions in the Philippines furnish no basis for their refusal to comply with the grand jury subpoenas.

2. Petitioners next contend (Pet. 15-18) that pursuant to 28 U.S.C. 1782, they may assert before the

grand jury the privilege against compulsory self-incrimination that is provided for in the Philippine Constitution. Section 1782, however, is wholly inapplicable to this case. As its title shows, that section relates only to "[a]ssistance to foreign and international tribunals and to litigants before such tribunals." It provides that a district court may order an individual to give testimony or evidence "for use in a proceeding in a foreign or international tribunal" pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or any interested person. In complying with such a district court order, "[a] person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege." By its plain terms, Section 1782 does not apply to subpoenas for documents to be used in a federal grand jury investigation. A federal grand jury investigation is not a "proceeding in a foreign or international tribunal." Section 1782 simply does not purport to allow witnesses summoned before a grand jury to assert privileges that may exist in some other country.

Petitioners incorrectly assert (Pet. 17) that the court of appeals interpreted the Mutual Legal Assistance Agreement (Pet. App. 15a-18a), to "by-pass" Section 1782. The Agreement, which was signed on June 11, 1986, by representatives of the United States Department of Justice and the Presidential Commission on Good Government of the Republic of the Philippines, establishes procedures by which the United States and the Republic of the Philippines may assist each other in their respective investigations regarding transactions between the Philippine government or its citizens and American companies

or citizens (Pet. App. 15a). It facilitates the sharing of evidence, an aim entirely consistent with Section 1782. But the existence of the Agreement does not render the federal grand jury investigation a sham or a tool of the Philippine government. The grand jury is conducting a criminal investigation into violations of this country's federal criminal laws. This investigation began in 1984, while petitioner Ferdinand Marcos was President of the Philippines. Moreover, as the court of appeals found, the grand jury subpoenaed the documents in petitioners' possession on its own initiative, not at the behest or suggestion of the Philippine government (Pet. App. 8a). Despite the protections against disclosure provided by Fed. R. Crim. P. 6(e) (prohibiting disclosure of matters occurring before the grand jury), petitioners assert (Pet. 15) that any documents they provide to the grand jury will be turned over to the Philippine government pursuant to the terms of the Agreement. That speculative assertion does not alter the legitimacy of the grand jury investigation.[9] In sum, Section 1782 has no application to this case and does not permit petitioners to assert before the grand jury privileges that are available under Philippine law.

3. Petitioners contend (Pet. 18-23) that act-of-production immunity is inadequate to protect them against the risk that the documents will be used against them in a prosecution in the Philippines. Last Term, this Court denied a certiorari petition filed by petitioners' daughter and son-in-law making the identical argument. *Araneta* v. *United States*, No. 86-172 (Oct. 6, 1986). There is no reason for a different disposition here.

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[9] The assertion is not only speculative; it also misreads the Agreement. See page 13, *infra*.

As in *Araneta*, the question whether the Fifth Amendment protects an immunized witness from testifying before a federal grand jury is not squarely presented here. Petitioners have not sustained their burden of showing that they face a "substantial risk" that the subpoenaed documents will be used in a prosecution in the Philippines. See *Zicarelli* v. *New Jersey Investigation Comm'n*, 406 U.S. 472, 478 (1972) (finding no Fifth Amendment privilege in the absence of a substantial risk). Accord *In re Sealed Case*, No. 87-5208 (D.C. Cir. Aug. 7, 1987), slip op. 6-7. The Fifth Amendment only "protects against real dangers, not remote and speculative possibilities" (*Zicarelli*, 406 U.S. at 478 (footnote omitted)).

Petitioners argue (Pet. 19) that they face a greater risk of being returned to the Philippines than the Aranetas faced, because petitioners "are the principal targets of the Philippine prosecution." As we explained in our brief in opposition (at 7) in *Araneta* v. *United States*, *supra*, however, it remains the case that the United States has no present intention of returning petitioners to the Philippines against their will, and there is no extradition treaty between the United States and the Philippines that entitles that country to seek their return. Moreover, although the Aranetas are free to leave this country if they wish to do so, the United States has recently taken steps to restrict the ability of petitioner Ferdinand Marcos to leave this country voluntarily. On July 6, 1987, the Immigration and Naturalization Service issued a departure control order prohibiting Ferdinand Marcos from departing from the United States. On the same day, the INS imposed additional conditions on his parole status that require him to obtain

written permission before leaving the Island of Oahu. See App., *infra*, 1a.[10]

Petitioners also have failed to show that they face a substantial risk that the subpoenaed documents will be turned over to the Philippine government. Under the terms of the Mutual Legal Assistance Agreement, the United States is obligated to turn over documents only as permitted by the "law, practice and procedure[s]" of the United States. Pet. App. 16a.[11] The law of the United States includes rules protecting grand jury secrecy. See Fed. R. Crim. P. 6(e). There is no reason to believe that Rule 6(e) will be ignored. Petitioners have not sought the further assurance of a protective order. It is for the district court to determine, in the first instance, whether such an order would be appropriate in the circumstances of this case. The courts of appeals have consistently considered protective orders and rules governing grand jury secrecy to be sufficient to protect a witness who gives compelled testimony against the risk that the compelled testimony may be used in a foreign prosecution. See, *e.g.*, *United States* v. *Joudis*, 800 F.2d 159, 161-164 (7th Cir. 1986); *In re President's Commission on Organized Crime*, 763 F.2d 1191, 1199 (11th Cir. 1985); *In re Grand Jury Proceedings* (*Chevrier*), 748 F.2d 100, 104-105 (2d Cir. 1984); *In re Grand Jury Proceeding 82-2* (*Nigro*), 705

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[10] These new conditions were imposed in part because of a belief that petitioner was intending to leave the United States voluntarily, "in a manner which would be prejudicial to the interests of the United States." App., *infra*, 3a.

[11] The Agreement also provides that "[a]ll assistance by a requested state will be performed subject to all limitations imposed by its domestic law" (Pet. App. 17a).

F.2d 1224, 1227 (10th Cir. 1982), cert. denied, 461 U.S. 927 (1983) (collecting cases).[12]

In short, petitioners have not shown that they face a "substantial risk" that the subpoenaed documents will someday be used against them in a foreign prosecution. A lawful grand jury investigation may not be impeded unless concrete risks are identified. *Zicarelli* v. *New Jersey Investigation Comm'n, supra.* The act-of-production immunity will sufficiently protect petitioners' privilege against compulsory self-incrimination in all United States courts. On the record made by petitioners, no further protection is required.

Even if petitioners had met their burden of showing that they face a substantial risk of foreign prosecution in which their compelled disclosures may be used against them, the Fifth Amendment question does not warrant review by this Court at this time. The decision of the court below does not conflict with any decision of this Court. In *Murphy* v. *Waterfront Comm'n,* 378 U.S. 52 (1964), on which petitioners rely, the Court held only that "the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law" (*id.* at 77-78). Although the Court noted in dicta that English courts had held that the privilege against compulsory self-

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[12] Moreover, as petitioners point out (Pet. 5, 16), the Republic of the Philippines also has a constitutional privilege against compulsory self-incrimination, which could lead to the exclusion of compelled evidence in a Philippine court. Therefore, even if there were to be a Philippine prosecution, and even if the subpoenaed documents were turned over to representatives of the Philippines, it is still open to question whether the documents would actually be used to incriminate petitioners.

incrimination protected against the risk of foreign prosecution (see *id.* at 58-63), the Court nowhere suggested that the Fifth Amendment protects persons like petitioners from giving immunized testimony before a grand jury because they might someday be forced to stand trial in a foreign country. Instead, the Court in *Murphy* carefully distinguished that case from the federal-state case before it (378 U.S. at 67); as the Court's discussion indicated (*id.* at 67-68), there are differences between the two cases that would justify *not* extending the privilege to protect against incrimination in a foreign prosecution.[13]

The only other circuit that has addressed the question has concluded, like the court below, that the Fifth Amendment does not protect a witness against the risk that his testimony may be used against him by a foreign government. See *In re Parker*, 411 F.2d 1067, 1070 (10th Cir. 1969), vacated and dismissed as moot, 397 U.S. 96 (1970). The only state court to address the question has reached the same conclusion. *Phoenix Assurance Co.* v. *Runck*, 317 N.W.2d 402, 413 (N.D.), cert. denied, 459 U.S. 862 (1982). Three district courts have agreed with petitioners' position on the Fifth Amendment issue,

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[13] In arguing that the Mutual Legal Assistance Agreement will render a Philippine prosecution, if one occurs, a "joint venture" between the United States and the Philippines, petitioners assert (Pet. 25) that the decision below is in conflict with *Byars* v. *United States*, 273 U.S. 28 (1927), and *Lustig* v. *United States*, 338 U.S. 74 (1949). Petitioners' "joint venture" argument is incorrect, for the reasons noted, pages 10-11, *supra*. *Byars* and *Lustig* are simply irrelevant. Those exclusionary rule cases hold that evidence that is legally seized during a joint federal and state investigation is inadmissible in a federal criminal trial. Neither case purports to impose a rule of exclusion for a foreign court.

but those decisions have never been embraced by their respective circuits. See *Mishima* v. *United States*, 507 F. Supp. 131, 135 (D. Alaska 1981); *United States* v. *Trucis*, 89 F.R.D. 671, 673 (E.D. Pa. 1981); *In re Cardassi*, 351 F. Supp. 1080, 1085-1086 (D. Conn. 1972). Few courts have had to address the constitutional question, because the subpoenaed witness can rarely make the threshold showing of a substantial risk of a foreign prosecution that is required by *Zicarelli*. See, *e.g.*, *In re Sealed Case*, *supra*; *United States* v. *Joudis*, *supra*. In light of the absence of any conflict among the circuits on this issue and the infrequency with which the issue arises, review by this Court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

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Attorney

SEPTEMBER 1987

APPENDIX

[SEAL]

U.S. Department of Justice
Immigration and
Naturalization Service

District Director

595 Ala Moana Boulevard
P.O. Box 461
Honolulu, HI. 96809

July 6, 1987

HHW 212.7-C

Mr. Ferdinand Marcos
2338 Makiki Heights Drive
Honolulu, HI 96822

Dear Mr. Marcos:

Pursuant to the authority vested in me as District Director of the Hawaii District Office of the Immigration and Naturalization Service, this is to notify you of the following additional conditions of your parole into the United States:

> You must obtain from the District Director in Honolulu written permission to leave the Island of Oahu by any means. In this regard you must submit a written request to the District Director at least forty-eight (48) hours in advance of your proposed departure. This written request must include your purpose of travel, your itinerary, all means of transportation from your Makiki Heights residence, including the person or entity from whom the craft is obtained, its registration numbers, the crew's identities, and the number and identity of your traveling party.

You may be required to furnish additional information.

These conditions are imposed upon you by the authority vested in me as District Director by 8 U.S.C. 1182(d)(5) and 8 C.F.R. 212.5.

Please be assured I will give any request you may make my utmost consideration.

Sincerely,

/s/ William W. Craig
WILLIAM W. CRAIG
District Director

[SEAL]

U.S. Department of Justice
Immigration and
Naturalization Service

District Director

595 Ala Moana Boulevard
P.O. Box 461
Honolulu, HI. 96809

July 6, 1987

HHW 215-C

Mr. Ferdinand Marcos
2338 Makiki Heights Drive
Honolulu, HI 96822

Dear Mr. Marcos:

The provisions of 8 U.S.C., Section 1185(a)(1) make it unlawful for any alien to depart the United States unless such departure is in conformity with the rules and regulations issued under that section. I now have reason to believe that you intend to depart from the United States, in a manner which would be prejudicial to the interests of the United States. I further have reason to believe that your departure from the United States would fall within 8 C.F.R., Section 215.3, a copy of which is attached, and is therefore prohibited. Consequently, in accordance with the authority vested in me under 8 C.F.R., Section 215.2 (a), a copy of which is attached, you are hereby ordered that you shall not depart the United States until such time as this order is revoked.

In conformity with 8 C.F.R., Section 215.4, you have a right to a hearing before a special inquiry officer (immigration judge) regarding this order. A copy of the regulations describing the hearing process and

your entitlement to representation during that process is attached.

Any such request for a hearing must be received by the undersigned at: 595 Ala Moana Boulevard, Honolulu, Hawaii 96813. If you do not make a timely request for such a hearing, this order shall become final fifteen (15) days from the date of service upon you.

Sincerely,

/s/ William W. Craig
WILLIAM W. CRAIG
District Director

Attachments

Service acknowledged

/s/ Ferdinand Emelio Marcos
FERDINAND EMELIO MARCOS
Date: 6 July 1987

I, however, take exception to the second sentence about having reason to believe that I intend to depart from the United States in a manner prejudicial to the the [*sic*] interests of the U.S. I have no such intention of departing without notice to the U.S.

(Signed)
FERDINAND MARCOS

8 C.F.R.

§ 215.2 *Authority of departure-control officer to prevent alien's departure from the United States*

(a) No alien shall depart, or attempt to depart, from the United States if his departure would be prejudicial to the interests of the United States under the provision of § 215.3. Any departure-control officer who knows or has reason to believe that the case of an alien in the United States comes within the provisions of § 215.3 shall temporarily prevent the departure of such alien from the United States and shall serve him with a written temporary order directing him not to depart, or attempt to depart, from the United States until notified of the revocation of the order.

(b) The written order temporarily preventing an alien, other than an enemy alien, from departing from the United States shall become final 15 days after the date of service thereof upon the alien, unless prior thereto the alien requests a hearing as hereinafter provided. At such time as the alien is served with an order temporarily preventing his departure from the United States, he shall be notified in writing concerning the provisions of this paragraph, and shall be advised of his right to request a hearing if entitled thereto under § 215.4. In the case of an enemy alien, the written order preventing departure shall become final on the date of its service upon the alien.

(c) Any alien who seeks to depart from the United States may be required, in the discretion of the departure-control officer, to be examined under oath and to submit for official inspection all documents, articles, and other property in his possession which are being removed from the United States upon, or in connection with, the alien's departure. The depar-

ture-control officer may permit certain other persons, including officials of the Department of State and interpreters, to participate in such examination or inspection and may exclude from presence at such examination or inspection any person whose presence would not further the objectives of such examination or inspection. The departure-control officer shall temporarily prevent the departure of any alien who refuses to submit to such examination or inspection, and may, if necessary to the enforcement of this requirement, take possession of the alien's passport or other travel document.

§ 215.3 *Aliens whose departure is deemed prejudicial to the interests of the United States.*

The departure from the United States of any alien within one or more of the following categories shall be deemed prejudicial to the interests of the United States.

(a) Any alien who is in possession of, and who is believed likely to disclose to unauthorized persons, information concerning the plans, preparation, equipment, or establishments for the national defense and security of the United States.

(b) Any alien who seeks to depart from the United States to engage in, or who is likely to engage in, activities of any kind designed to obstruct, impede, retard, delay or counteract the effectiveness of the national defense of the United States or the measures adopted by the United States or the United Nations for the defense of any other country.

(c) Any alien who seeks to depart from the United States to engage in, or who is likely to engage in, activities which would obstruct, impede, retard, delay or counteract the effectiveness of any plans made

or action taken by any country cooperating with the United States in measures adopted to promote the peace, defense, or safety of the United States or such other country.

(d) Any alien who seeks to depart from the United States for the purpose of organizing, directing, or participating in any rebellion, insurrection, or violent uprising in or against the United States or a country allied with the United States, or or waging a war against the United States or its allies, or of destroying, or depriving the United States of sources of supplies or materials vital to the national defense of the United States, or to the effectiveness of the measures adopted by the United States for its defense, or for the defense of any other country allied with the United States.

(e) Any alien who is subject to registration for training and service in the Armed Forces of the United States and who fails to present a Registration Certificate (SSS Form No. 2) showing that he has complied with this obligation to register under the Universal Military Training and Service Act, as amended.

(f) Any alien who is a fugitive from justice on account of an offense punishable in the United States.

(g) Any alien who is needed in the United States as a witness in, or as a party to, any criminal case under investigation or pending in a court in the United States: *Provided,* That any alien who is a witness in, or a party to, any criminal case pending in any criminal court proceeding may be permitted to depart from the United States with the consent of the appropriate prosecuting authority, unless such alien is otherwise prohibited from departing under the provisions of this part.

(h) Any alien who is needed in the United States in connection with any investigation or proceeding being, or soon to be, conducted by any official executive, legislative, or judicial agency in the United States or by any governmental committee, board, bureau, commission, or body in the United States, whether national, state, or local.

(i) Any alien whose technical or scientific training and knowledge might be utilized by an enemy or a potential enemy of the United States to undermine and defeat the military and defensive operations of the United States or of any nation cooperating with the United States in the interests of collective security.

(j) Any alien, where doubt exists whether such alien is departing or seeking to depart from the United States voluntarily except an alien who is departing or seeking to depart subject to an order issued in extradition, exclusion, or deportation proceedings.

(k) Any alien whose case does not fall within any of the categories described in paragraphs (a) to (j) inclusive, of this section, but which involves circumstances of a similar character rendering the alien's departure prejudicial to the interests of the United States.

§ 215.4 *Procedure in case of alien prevented from departing from the United States.* (a) Any alien, other than an enemy alien, whose departure has been temporarily prevented under the provisions of § 215.2 may, within 15 days of service upon him of the written order temporarily preventing his departure, request a hearing before a special inquiry officer. The alien's request for a hearing shall be

made in writing and shall be addressed to the district director having administrative jurisdiction over the alien's place of residence. If the alien's request for a hearing is timely made, the district director shall schedule a hearing before a special inquiry officer, and notice of such hearing shall be given to the alien. The notice of hearing shall, as specifically as security considerations permit, inform the alien of the nature of the case against him, shall fix the time and place of the hearing, and shall inform the alien of his right to be represented, at no expense to the Government, by counsel of his own choosing.

(b) Every alien for whom a hearing has been scheduled under paragraph (a) of this section shall be entitled (1) to appear in person before the special inquiry officer, (2) to be represented by counsel of his own choice, (3) to have the opportunity to be heard and to present evidence, (4) to cross-examine the witnesses who appear at the hearing, except that if, in the course of the examination, it appears that further examination may divulge information of a confidential or security nature, the special inquiry officer may, in his discretion, preclude further examination of the witness with respect to such matters, (5) to examine any evidence in possession of the Government which is to be considered in the disposition of the case, provided that such evidence is not of a confidential or security nature the disclosure of which would be prejudicial to the interests of the United States, (6) to have the time and opportunity to produce evidence and witnesses on his own behalf, and (7) to reasonable continuances, upon request, for good cause shown.

(c) Any special inquiry officer who is assigned to conduct the hearing provided for in this section shall

have the authority to: (1) administer oaths and affirmations, (2) present and receive evidence, (3) interrogate, examine, and cross-examine under oath or affirmation both the alien and witnesses, (4) rule upon all objections to the introduction of evidence or motions made during the course of the hearing, (5) take or cause depositions to be taken, (6) issue subpoenas, and (7) take any further action consistent with applicable provisions of law, Executive orders, proclamations, and regulations.

§ 215.5 *Hearing procedure before special inquiry officer.* (a) The hearing before the special inquiry officer shall be conducted in accordance with the following procedure:

(1) The special inquiry officer shall advise the alien of the rights and privileges accorded him under the provisions of § 215.4.

(2) The special inquiry officer shall enter of record (i) a copy of the order served upon the alien temporarily preventing his departure from the United States, and (ii) a copy of the notice of hearing furnished the alien.

(3) The alien shall be interrogated by the special inquiry officer as to the matters considered pertinent to the proceeding, with opportunity reserved to the alien to testify thereafter in his own behalf, if he so chooses.

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No. 87-34

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FERDINAND E. MARCOS

and

IMELDA R. MARCOS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners Ferdinand E. Marcos and Imelda R. Marcos hereby submit their reply to the opposition brief filed by the United States on September 4, 1987.

ARGUMENT

I. THE CONFUSION IN THE GOVERNMENT'S ANALYSIS OF HEAD OF STATE IMMUNITY DEMONSTRATES THE NEED FOR CONSIDERATION OF THE ISSUE BY THIS COURT

The United States contends that the court below was correct in giving effect to the "waiver" of Petitioners' immunity by the current Philippine government. The confusion in the Government's analysis is so pronounced, however, that it not only demonstrates why this position is incorrect, but also suggests why the issue requires prompt review by this Court.

The most fundamental flaw in the Government's argument is its collapse of the head of state immunity doctrine into the immunity of foreign states and state entities, which is governed by the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1602-1611. *See* Brief For The United States In Opposition ("Opp.") at 5-7. The two doctrines, head of state and state immunity, are separate legal concepts, which have separate histories and are governed by separate law. *See generally* Note, *Resolving The Confusion Over Head of State Immunity: The Defined Rights of Kings* 86 Colum. L. Rev. 169, 171 (1986) ("despite their common origins, head of state immunity and sovereign immunity have evolved into separate legal constructs"). Unlike foreign state immunity, head of state immunity is a doctrine of customary international law, and is not governed by the Foreign Sovereign Immunities Act. *See Republic of the Philippines v. Marcos*, Misc. No. 86-706 (WHO) (N.D. Cal. Feb. 11, 1987), Civ. Nos. 86-0213, 86-0155 (D. Hawaii) ("[a]lthough head-of-state immunity has its origins in sovereign immunity, arising

in a period when the head of state and the state itself were considered one, the doctrine is now independent of sovereign immunity and guided by separate principles"); *Domingo v. Marcos*, Civ. No. C82-1055V (W.D. Wash. July 14, 1983) (order affirming United States' argument that head of state immunity is not governed by the FSIA, which eliminated State Department suggestion mechanism); *Kilroy v. Windsor (Prince Charles, The Prince of Wales)*, No. C-78-291 (N.D. Ohio Dec. 7, 1978) (same).[1]

The Government's confusion on this point leads it to reject the notion that part of the underlying purpose of head of state immunity is to insulate foreign leaders from the threat of being subjected to the jurisdiction of foreign courts, an operation that serves to protect the proper functioning of governments. *See* Pet. at 14; Opp. at 6 n.7.

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[1] This proposition was reconfirmed as recently as six weeks ago in a case involving President Mohammed Hosni Mubarak of Egypt. Application For Trustee To Abandon Claims To The Benefit Of Debtor, *In Re Edwin Paul Wilson*, Case No. 84-01415-A (Bankr. E.D. Va. June 18, 1987). There ex-CIA agent Edwin Wilson applied to bankruptcy court for permission to pursue claims against President Mubarak and others arising out of arms sales to Egypt effected pursuant to the 1979 Camp David Accords, at a time when Mubarak was Vice President of Egypt. On August 5, 1987, the United States filed a Suggestion of Immunity on behalf of President Mubarak (and another high-ranking Egyptian official), citing the doctrine of head of state immunity. (For the convenience of the Court, a copy of the August 5, 1987 Suggestion of Immunity is reproduced in the Appendix hereto at 1a.) Because the proposed complaint involved a contract dispute, the action would fall within the "commercial activity" exception to the FSIA, 28 U.S.C. § 1605(a)(2), if it were brought against a foreign state, so that the foreign state would not enjoy immunity. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983). In the case of President Mubarak, where the action is directed not to a foreign state but to a head of state, the FSIA's commercial activity exception does not apply. *Accord, Domingo v. Marcos*, No. C82-1055V (W.D. Wash. July 14, 1983) (dismissal of then-President Marcos and his wife in wrongful death action falling within the "tort exception" to the FSIA, 28 U.S.C. § 1605(a)(5): to date, the Republic of the Philippines remains a defendant in this suit).

Relying on the state immunity doctrine, the Government argues that sovereign immunity is founded "solely on notions of comity," and concludes thus that the principle of shielding government officials, long established in domestic law, *Spalding v. Vilas*, 161 U.S. 483, 498 (1896), *Nixon v. Fitzgerald*, 457 U.S. 731, 745 (1982), plays no part in the head of state doctrine. *Id.* While there may be some merit to this argument when it is applied to a legal abstraction such as a foreign state, the same can not be said in the case of a head of state (or other government official) who is able to feel the serious chilling effect of potential litigation. Indeed, this principle has been recognized in State Department Suggestions of Immunity as part of the underlying rationale for the head of state immunity doctrine. Letter of Abraham D. Soafer, Legal Advisor, State Department, dated July 30, 1987, *In Re Edwin Paul Wilson*, Case No. 84-01415-A (Bankr. E.D. Va. 1987) ("[a] central purpose of the immunities involved in this matter is the interest in preventing improper suits against certain classes of foreign officials, to prevent harassment and interference with the performance of their duties") (*see* 11a, *infra*); Letter of Monroe Leigh, Legal Advisor, State Department, dated Sept. 26, 1975), *Psinakis v. Marcos*, No. C-75-1725 (N.D. Cal.), 1975 Dig. U.S. Prac. Int'l L. 344, 345 ("[i]t may be that the basis for a Head of State immunity . . . [is] that a Head of State performs important functions which should not be interfered with by the necessity of defending litigation in foreign countries"). When the protective role played by head of state immunity is properly understood, it becomes evident that the doctrine would be eviscerated by acceptance of the power of successor governments to waive the immunity of their former leaders, especially where there is political hostility between them.

The failure to focus on the singular role played by heads of state underlies another of the basic flaws in the Government's brief. The United States contends that, because governments have the power to waive the im-

munity of the state and of diplomats,[2] governments also should have the power to waive the immunity of their former heads of state. This argument ignores the fact that heads of state have unique policy-making responsibilities that neither states nor diplomats possess. A state itself, as a legal abstraction, does not perform a decision-making function, while the role of a diplomat typically is limited to the execution of his or her government's policy, not its formulation. A head of state, on the other hand, operates on an entirely different order of governmental responsibilities. The unique functions of a head of state require the protection of an international immunity.

Finally, though there are other errors,[3] the Government's brief also reflects a basic misunderstanding of the application of domestic law to interpretation of the head of state doctrine. Under U.S. law, the immunity of a U.S.

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[2] The Government cites no authority, and we find none, in support of the proposition that a government can waive the immunity of its former (as opposed to active) diplomats.

[3] Among the more obvious is the assertion that the immunity enjoyed by President Marcos does not extend to his wife, Imelda R. Marcos. Opp. at 5 n.5. Under customary international law, head of state immunity extends to the spouse of the head of state. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 66. Indeed, based on a State Department Suggestion of Immunity, head of state immunity previously was extended to Mrs. Marcos. Letter of James H. Michel, Acting Legal Advisor, State Department, dated Dec. 2, 1982, *Domingo v. Marcos*, No. C82-1055V (W.D. Wash. filed Sept. 14, 1982), ("Mrs. Marcos is a member of the immediate family of President Marcos and, therefore, partakes of his immunity").

The United States also errs in its attempts to deflect the impact of the domestic cases establishing the immunity of U.S. Presidents on the instant case. *Nixon v. Fitzgerald*, 457 U.S. at 731; *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). *See* Opp. at 9. The Government seeks to distinguish these cases on the ground that the scope of U.S. Presidential immunity does not encompass the facts of this case. The *scope* of immunity, however, is entirely irrelevant to the issue here, which is whether the immunity, whatever its scope, can be waived by a successor government.

President is possessed by the President himself, *Nixon v. Fitzgerald*, 457 U.S. at 731, and as such cannot be waived by an incumbent president. *Cf. Nixon v. Administrator of General Services*, 433 U.S. 425, 449 (1977); U.S. Department of Justice, Office of Legal Counsel, Re: Nixon Paper Regulations (Memorandum of February 18, 1986) ("we believe that it would be inconsistent with the rationale underlying the former President's privilege for the incumbent to sit as judge of the validity of a predecessor's claim"). *See also* Pet. at 11-13. Nonetheless, the Government argues that the court should accept the Philippine government's waiver of Petitioners' immunity because this would establish as a principle of international law the proposition that the United States government is empowered to decide "whether former United States Presidents are to be granted immunity." Opp. at 8. Acceptance of this principle, however, would require the rejection of the policy articulated in the above-cited decisions of this Court, which place the assertion of privileges and immunities of U.S. Presidents beyond the reach of their successors.

The Government's brief thus exhibits a number of basic misunderstandings regarding the proper interpretation of the head of state immunity doctrine. This confusion reflects a wider uncertainty, shared by courts, commentators, and no doubt by members of the international community, about the manner in which the head of state doctrine is to be interpreted in the United States. This state of affairs has been fostered, at least in part, by this Court's failure to rule in this area, and is exacerbated by the fact that the FSIA is silent as to the immunity of heads of state.[4] Accordingly, because of the

[4] Unlike the FSIA, sovereign immunity statutes recently passed by a number of other countries expressly encompass the immunities of heads of state. State Immunity Act of 1978, 26 & 27 Eliz. 2, ch. 33, *reprinted in* 17 I.L.M. 1123 (1978) (British); Act to Provide for State Immunity in Canadian Courts, 1982, 29, 30 & 31 Eliz. 2, ch. 95, *reprinted in* 21 I.L.M. 798 (1982) (Canadian); Foreign States Immunities Act 1985, Act of Australian Parliament No. 196 (Dec. 16, 1985) (Australian).

significance this issue holds for the conduct of foreign relations, reviewed by this Court is imperative.

II. THE UNITED STATES HAS NOT SHOWN THAT THE EXECUTIVE HAS THE POWER TO BY-PASS AN ACT OF CONGRESS THROUGH THE USE OF A SOLE EXECUTIVE AGREEMENT

The United States argues that Petitioners are not entitled to assert the privilege against self-incrimination under the Philippine Constitution based on 28 U.S.C. § 1782 because this statute "is wholly inapplicable to this case." Opp. at 10. The Government appears to be arguing that § 1782 would apply only if the federal grand jury were a "sham" or a "tool of the Philippine government." *Id.* at 11. This argument completely misses the point.

Despite the Government's suggestion to the contrary, Petitioners do not claim that the existence of the Mutual Assistance Agreement renders the federal grand jury investigation a "sham" or that the grand jury is nothing more than a "tool of the Philippine government." Opp. at 11. The grand jury is, however, investigating allegations of kickbacks paid in connection with arms contracts with the Philippines, which are the subject of a parallel criminal investigation in the Philippines. The two investigations are linked through the Mutual Assistance Agreement, which obligates each government to share evidence bearing on the subject matters of the investigations. The Government still does not dispute the fact that the U.S. will be under a legal obligation to provide the Philippine government with copies of any documents produced by Petitioners to the grand jury, which will entail seeking a court order to remove the Rule 6(e) constraints on the dissemination of these documents. Transmission of the documents at the Philippines' request through the mechanism of the Mutual Assistance Agreement will be "assistance to a foreign tribunal" within the meaning of § 1782, except that in this context it will be without the benefit of the protections guaranteed by this statute. For the reasons stated in the petition for

certiorari, this use of the Mutual Assistance Agreement to by-pass existing legislation is an unconstitutional abrogation of Congressional powers by the Executive. Pet. at 15-18. Because of the growing reliance on the use of Mutual Assistance Agreements in the area of international law enforcement, prompt consideration and correction of the Circuit Court's decision on this issue is required.

III. THE UNITED STATES HAS NOT SHOWN WHY THE COURT SHOULD DECLINE TO HEAR THE FIFTH AMENDMENT ARGUMENT

The United States contends that Petitioners are not entitled to assert their Fifth Amendment privilege against self-incrimination based on fear of foreign prosecution because (a) Petitioners do not face a substantial risk of prosecution in the Philippines, and (b) the Fourth Circuit's ruling on the Fifth Amendment question does not warrant review by this Court. Opp. at 11-16. The Government's arguments are specious.

The Fourth Circuit's finding of a substantial risk of prosecution in *United States v. Under Seal (Araneta)*, 794 F.2d 920 (4th Cir.), *cert. denied*, 107 S.Ct. 331 (1986) to the contrary notwithstanding, the United States argues that Petitioners do not face a substantial risk of ever returning to the Philippines. Opp. at 12-13. The Government asserts that it has "no present intention" of returning Petitioners to the Philippines and notes, *inter alia*, that the Immigration and Naturalization Service recently restricted President Marcos to the Island of Oahu. *Id.* This does nothing to contravene the fact that the United States exercises absolute control over Petitioners' physical location at the present juncture, and that future decisions regarding Petitioners' return to the Philippines will be made by the United States at its sole discretion based on a political evaluation of the appropriateness of such action at the time. Though the U.S. may have "no present intention" of returning Petitioners to the Philippines, we need not labor

the point that the intentions of the Executive are subject to precipitous change. Indeed, though many factors may influence a decision to return Petitioners to the Philippines, a recent decision by the Swiss Supreme Court may play a prominent role in this regard. On July 1, 1987, the Swiss Court ruled that information regarding Swiss bank accounts allegedly owned by President Marcos will not be released to the Philippine government unless and until the Swiss courts are satisfied that President Marcos is accorded certain due process rights in connection with the Philippine criminal proceedings, which may require that President Marcos physically be present in the Philippines to face the charges against him. *Petition for Assistance of the Republic of the Philippines*, Appeal Nos. A117, A123, A125 (BGE I July 1, 1987).

With respect to the Fifth Amendment issue, the Government claims that the Fourth Circuit's decision in *Araneta*, affirmed below in the instant case, does not conflict with this Court's decision in *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964). As the sole basis for its claim, the Government asserts that:

> the Court in *Murphy* carefully distinguished that case from the federal-state case before it (378 U.S. at 67); as the Court's discussion indicated (*id.* at 67-68), there are differences between the two cases that would justify *not* extending the privilege to protect against incrimination in a foreign prosecution.

Opp. at 15 (original emphasis). In light of the Government's argument, we have revisited the *Murphy* decision, but we find nothing in the case to support the Government's claim that *Murphy* distinguishes federal-state cases from the facts of the instant case. Indeed, in the pages cited by the Government (67,68) the Court distinguishes two factors used as a basis of decision in a case *rejected* by the Court as a correct articulation of the English rule, which, according to the *Murphy* Court, is properly understood to be that the privilege against self-incrimination can rest on fear of prosecution in a

foreign country. *Id.* at 61-63. In other words, the Court in these pages is showing why the reasoning that would lead to the opposite conclusion is flawed; there is nothing in these passages or elsewhere in the opinion to suggest any retreat from the Court's broad acceptance of the English rule.

As noted in our petition, the Fifth Amendment question has been raised many times in the fifteen years since this Court first voted to consider the question in *Zicarelli v. New Jersey State Commission of Investigation*, 406 U.S. 472 (1972). After the petition was filed, the issue appeared once again in a reported decision, this time in a case before the Court of Appeals for the District of Columbia Circuit, *In re Sealed Case*, No. 87-5208, slip op. (D.C. August 7, 1987).[5] Because there is a clear conflict between the Fourth Circuit's opinions and this Court's decision in *Murphy*, the continued proliferation of these cases mandates immediate review by this Court.

IV. THE GOVERNMENT FAILS TO ADDRESS THE JOINT VENTURE ISSUE

The Government declines to address the conflict between the joint venture standard articulated in *Araneta* and the standard established by this Court in *Byars v. United States*, 273 U.S. 28 (1927) and *Lustig v. United States*, 338 U.S. 74 (1949). Instead, the Government labels these cases "irrelevant," arguing cryptically that "[n]either case purports to impose a rule of exclusion for a foreign court." Opp. at 15 n.15.

If there is an argument here, we fail to understand it. The Government has simply declined to consider the impact of the reasoning of *Byars* and *Lustig*, which held that any official involvement by the federal government in non-federal activity *constitutionalizes* the non-federal activity. In the instant context, a finding of a joint ven-

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[5] In a *per curiam* opinion, the three-judge panel (Wald, Mikva, Bork) did not reach the constitutional issue, holding that appellant did not face a real danger of foreign prosecution.

ture between the U.S. and Philippine governments would eliminate the basis for the Fourth Circuit's holding in *Araneta*, which is that the Fifth Amendment is not available to President Marcos' daughter and son-in-law because the U.S. Constitution does not extend to the Philippine government. As the Fourth Circuit correctly noted in *Araneta*, however, this reasoning would be vitiated by a finding that the U.S. and Philippine governments are engaged in a joint venture, constitutionalizing the Philippine prosecution. As such, the framework of the Fourth Circuit's analysis is correct; the court erred only in its articulation of the standard for finding a joint venture. *Byars* and *Lustig* establish that a joint venture exists if there is any official participation of the U.S. government in the Philippine prosecution, which is contrary to the Fourth Circuit's statement that a joint venture exists only if it can be shown that the U.S. "inspired, instigated or controls" the Philippine actions. Because this issue will have an important impact on the future of U.S. cooperation with the law enforcement activities of foreign governments, it requires prompt review by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order and judgment of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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Dated: September 18, 1987

APPENDIX

APPENDIX

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Case No. 84-01415-A

IN the MATTER of
EDWIN PAUL WILSON,
Debtor.

[Filed Aug. 5, 1987]

SUGGESTION OF IMMUNITY BY THE UNITED STATES IN RESPONSE TO DEBTOR'S APPLICATION FOR TRUSTEE TO ABANDON CLAIMS TO DEBTOR'S BENEFIT

The Attorney General of the United States, through his undersigned attorneys, pursuant to Section 517, Title 28 of the United States Code, respectfully informs this Honorable Court of the diplomatic interest of the United States in the pending application of the debtor for the abandonment of certain claims to his benefit and permission to file suit, and suggests to the Court the immunity from that suit of Mohammed Hosni Mubarak, President of the Arab Republic of Egypt, and Field Marshal Mohammed Abdel Halim Abu Ghazala, Deputy Prime Minister and Minister of Defense and Military Production of the Arab Republic of Egypt.[1] In further-

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[1] The United States, through the Attorney General, submits this Suggestion of Immunity in its capacity both as a creditor and as an interested party.

ance of its suggestion of immunity, the government respectfully requests that this Court not permit debtor's proposed complaint to go forward unless it deletes these two officials as proposed defendants. In support of this suggestion of immunity and requested disposition of debtor's application, the United States respectfully submits the following:

1. Edwin Paul Wilson, the debtor in this proceeding, has applied to the Court for an order instructing the trustee to abandon certain claims to his benefit arising from an alleged contractual arrangement with certain individuals to ship military equipment to Egypt. Prospective defendants include President Mubarak and Deputy Prime Minister Abu Ghazala.[2] At the time of events alleged in the proposed complaint, President Mubarak was Vice President of the Arab Republic of Egypt, and Deputy Prime Minister Abu Ghazala was the accredited Defense Attache to the Egyptian Embassy in Washington.

2. The United States has an interest and concern in the subject matter and outcome of the debtor's application not only because it is a creditor but, more importantly, because it involves the question of immunity of the head of state and diplomatic representative of a friendly foreign State from the jurisdiction of a federal court. This interest arises from a determination by the Executive Branch, in the implementation of its foreign policy and in the conduct of its international relations, that permitting the proposed suit to go forward against Egyptian President Murbarak and Deputy Prime Minister Abu Ghazala would be incompatible with this country's foreign policy interests. As discussed below, such a determination must be given effect by the Court.

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[2] Remaining proposed defendants include Richard Secord, Thomas Clines, Theodore Shackley, Erich F. Von Marbod, and Hussein K. Salem. This suggestion of immunity is not directed to any of these individuals.

3. The Attorney General has been informed by the Legal Adviser of the United States Department of State that the Government of the Arab Republic of Egypt formally has requested the Government of the United States to suggest the immunity of its President and Deputy Prime Minister from the debtor's proposed suit. The Attorney General has been informed further by the Legal Adviser:

> President Mubarak is the sitting head of State of Egypt. Mohammed Abu Ghazala, the Deputy Prime Minister and Defense Minister of Egypt, was accredited as the defense attache of the Egyptian embassy to the United States at the time of the action attributed to him in the proposed complaint. The Government of Egypt is entitled to assert certain privileges and immunities based on head of State and diplomatic immunity doctrines and has formally requested that the United States Government suggest the immunity of the President and Deputy Prime Minister from such a suit. We believe that the acts alleged in the factual allegations of the complaint are covered by these doctrines. Accordingly, the Department of State requests that the Department of Justice submit to the bankruptcy court an appropriate suggestion recognizing and allowing the immunity of President Mubarak and Deputy Prime Minister Abu Ghazala, and asking that the court not permit the referenced suit to go forward unless it deletes as defendants these two officials who enjoy immunity.

July 30, 1987 letter to Richard K. Willard from Abraham D. Sofaer at page 1 (copy attached as Exhibit A).

4. Under customary rules of international law, recognized and applied in the United States, the head of a foreign government, its foreign ministers and other diplomatic representatives, and those designated by the head of state or members of his official party are immune

from the jurisdiction of United States federal and state courts. Restatement (Second), Foreign Relations Law of the United States, Sec. 66.[3] Courts in the United States consistently have accepted as conclusive the determinations of the Department of State concerning the status and immunity of foreign representatives. *Chong Boon Kim* v. *Yim Yong Shik*, Civ. No. 12565 (Cir. Ct., 1st Dir. Ha. 1963), cited at 58 Am. J. Int'l L. 186 (1964).

In the case of President Mubarak, not only is he the sitting head of State, but the matters alleged in the proposed complaint would have occurred while he was sitting Vice President. Under the Constitution of Egypt, the Vice President of Egypt assumes the powers of the president of Egypt if the President, for any reason, cannot carry our his functions. *See* Const. Art. 82 (Arab Republic of Egypt). Further, the constitutional responsibilities of the President apply to the Vice President as well. *Id.* at Art. 139.

With respect to Deputy Prime Minister Abu Ghazala, he is currently Deputy Prime Minister of Egypt. Moreover, he was accredited defense attache to the Egyptian Embassy in Washington, during pertinent alleged events, entitling him to diplomatic immunity. Under the Vienna Convention on Diplomatic Relations, codified in the Diplomatic Relations Act, 22 U.S.C. 254a *et seq.*, immunity maintains with respect to acts performed in the exercise of his functions as a member of the mission, even after he ceases to be a member. The only specific act attributed

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[3] The immunity may derive from a formal or informal convention whereby one sovereign agrees to permit another sovereign, including his/her designated representatives, to enter the former's territory for official government business without threat of being subject to judicial process. *The Schooner Exchange* v. *McFaddon*, 11 U.S. 74, 86-87 (7 Cranch 116) (1812). As discussed *infra*, head of state immunity, applicable to President Mubarak, derives from an informal ~~reciprocal~~ convention, while diplomatic immunity, applicable to Deputy Prime Minister Abu Ghazala, derives from the Vienna Convention on Diplomatic Relations.

to Abu Ghazala by the proposed complaint is an act performed in his capacity as defense attache. Proposed complaint at ¶ 25. Diplomatic immunity from a court's jurisdiction on account of such activity is patently appropriate.

Accordingly, the immunities for heads of state and their ministers and diplomats are available to protect President Mubarak and Deputy Prime Minister Abu Ghazala from a court's jurisdiction.

5. The Supreme Court has mandated that the courts of the United States are bound by suggestions of immunity, such as this, which are submitted to the courts by the Executive Branch. *Ex Parte Republic of Peru*, 318 U.S. 578, 588-89 (1942); *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 36 (1945). Thus, in *Peru*, *supra*, the Supreme Court, without further review of the Executive's determination, declared that the suggestion of immunity must be accepted by the Judiciary as a "conclusive determination by the political arm of the Government" that the continued retention of jurisdiction would jeopardize the conduct of foreign relations. 318 U.S. at 589; *see Spacil* v. *Crowe*, 489 F.2d 614, 617 (5th Cir. 1974). Accordingly, upon the filing of a suggestion of immunity such as this, it becomes the "[C]ourt's duty" to surrender jurisdiction for which immunity has been recognized. *Peru*, 318 U.S. at 588; *Hoffman*, 324 U.S. at 35.

6. That the courts of the United States are mindful of the Supreme Court's teachings with respect to Executive Branch suggestions of immunity is evidenced by such recent cases as *Estate of Silme G. Domingo* v. *Marcos*, No. C82-1055V (W.D. Wash. Dec. 23, 1982) (wrongful death action against Ferdinand and Imelda Marcos dismissed pursuant to suggestion of immunity by the United States) (copy of Order attached as Exhibit B); *Psinakis* v. *Marcos*, No. C-75-1725 (N.D. Cal. 1975) *result reported in* [1975] *Digest of United States Practice in International Law*, pp. 344-45 (libel action

against Ferdinand Marcos dismissed pursuant to suggestion of immunity). A suggestion of immunity has been recognized as precluding the exercise of a federal court's jurisdiction not only in matters involving heads of state but also with respect to senior officials and representatives of foreign governments in this country on official business. *Kilroy* v. *Windsor*, No. C 78-291 (N.D. Ohio Dec. 7, 1978) (civil rights conspiracy action against Prince of Wales dismissed upon suggestion of immunity) (copy attached as Exhibit C); *Chong Boom Kim* v. *Yim Hong Shik*, *supra*, (tort action against Foreign Minister of the Republic of Korea dismissed upon the suggestion of immunity).

7. This traditional and appropriate deference of the Judiciary to Executive Branch suggestions of immunity is predicated on "compelling" considerations arising out of the conduct of our foreign relations. *Spacil* v. *Crowe*, 489 F.2d at 619. Several reasons support the justification for this deference. First,

> [s]eparation-of-powers principles impel a reluctance in the judiciary to interfere with or embarrass the executive in its constitutional role as the nation's primary organ or international policy.

Ibid., citing *United States* v. *Lee*, 106 U.S. 196, 209 (1882); *Peru*, 318 U.S. at 588. Second, in comparison with the Executive's institutional resources and extensive experience in the day-to-day conduct of the country's foreign affairs, the Judiciary is ill-equipped to second-guess Department of State determinations which may affect such interests. *Spacil*, 489 F.2d at 619. Finally, as the Court of Appeals for the Fifth Circuit also observed in *Spacil*, "[p]erhaps more importantly, in the chess game that is diplomacy, only the executive has a view of the entire board and an understanding of the relationship between isolated moves." *Ibid.*

Acknowledgement of the immunity of these two individuals is particularly appropriate. The Government of

Egypt is entitled to certain privileges and immunities for these individuals based on the head of state and diplomatic immunity doctrines, and has requested that the United States Government assert these immunities. The acts alleged in the factual allegations of the proposed complaint are clearly covered by these doctrines.

8. The United States recognizes that in the usual bankruptcy proceeding where, as here, available defenses to a prospective suit render claims framed by the suit of inconsequential value to the debtor's estate, it would not be unusual for the debtor's application for abandonment to be granted under the authority of 11 U.S.C. § 554. This is not the usual case, however. While the United States would apply for, and confidently anticipate, the dismissal of President Mubarak and Deputy Prime Minister Abu Ghazala on immunity grounds if suit were ever filed in district court, the injury to United States foreign policy interests would have occurred.

The Egyptian Government, recognizing that its President and Deputy Prime Minister are immune from the jurisdiction of federal courts under the referenced legal principles, has requested the United States government to take immediately available steps to secure the protections afforded by these immunities. The United States is obligated by customary international law and applicable treaties to preserve the immunities of foreign heads of state and diplomatic representatives. The debtor's application presents such an opportunity to now raise and implement the immunity's shield. As the letter of the Legal Adviser of the Department of State indicates, the United States would vigorously insist that a foreign government intervene at the earliest possible moment under its domestic laws if the situation involved a United States government official under similar circumstances.

The instant suggestion of immunity effectively asks this Court to decline to permit the debtor to utilize the procedures and rules of this Court to undertake a useless

act harmful to United States foreign policy interests. While the immunity suggestion goes to issues beyond those customarily embraced by debtor-creditor litigation, it is no less justified. On the contrary, the obviously high public interest in a strong, unfettered foreign policy argues forcefully for recognizing head of state and diplomatic immunities as grounds for disallowing the application with respect to President Mubarak and Deputy Prime Minister Abu Ghazala. As the Supreme Court has recognized recently, the power of a bankruptcy court to order the trustee to abandon claims is limited by public policy considerations, and the court has the authority to deny an application even though the claim is of no value to the estate. Where public policy interests might be adversely affected, abandonment is improper and a request to abandon will be denied. *MidAtlantic Bank* v. *New Jersey*, 106 S.Ct. 755, 759 (1986). In short, it would not be an abuse of this Court's discretion under 11 U.S.C. § 554 to decline to order abandonment of a potential lawsuit that no one has a right to bring in the first place.[4]

Conclusion

For the foregoing reasons, the debtor's application for the trustee to abandon claims should be denied unless the claims are limited to exclude litigation against President Mubarak and Deputy Prime Minister Abu Ghazala.

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[4] Moreover, ordering abandonment could be adverse to the interests of the Internal Revenue Service, a creditor in this matter holding non-dischargeable claims. Pursuit of such an action against President Mubarak and Defense Minister Abu Ghazala would likely give rise to sanctions under Rule 11 of the Federal Rules of Civil Procedure, in favor of the Egyptian officials and add additional post-petition creditors with whom the IRS would have to compete in collecting from debtor's post-petition assets.

Respectfully submitted,

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HENRY E. HUDSON
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EXHIBIT A

THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

July 30, 1987

Richard K. Willard, Esquire
Assistant Attorney General
Department of Justice
Washington, D.C. 20530

Dear Mr. Willard:

On June 18, 1987, an application was filed in the U.S. Bankruptcy Court for the Eastern District of Virginia entitled *In Re Edwin Paul Wilson*, Bankruptcy Case No. 84-01415. In the application, debtor applies for an order of abandonment of certain claims so that he can file a proposed civil lawsuit against several individuals, including President Mohammed Hosni Mubarak and Deputy Prime Minister and Defense Minister Mohammed Abu Ghazala.

President Mubarak is the sitting head of State of Egypt. Mohammed Abu Ghazala, the Deputy Prime Minister and Defense Minister of Egypt, was accredited as the defense attache of the Egyptian embassy to the United States at the time of the action attributed to him in the proposed complaint. The Government of Egypt is entitled to assert certain privileges and immunities based on head of State and diplomatic immunity doctrines and has formally requested that the United States Government suggest the immunity of the President and Deputy Prime Minister from such a suit. We believe that the acts alleged in the factual allegations of the complaint are covered by these doctrines. Accordingly, the Department of State requests that the Department of Justice submit to the bankruptcy court an appropriate

suggestion recognizing and allowing the immunity of President Mubarak and Deputy Prime Minister Abu Ghazala, and asking that the court not permit the referenced suit to go forward unless it deletes as defendants these two officials who enjoy immunity.

The Department of State attaches particular importance to obtaining a prompt decision by the Bankruptcy Court not to permit the filing of the proposed suit with respect to President Mubarak and Deputy Prime Minister Abu Ghazala in view of the significant foreign policy implications of such an action. A central purpose of the immunities involved in this matter is the interest in preventing improper suits against certain classes of foreign officials, to prevent harassment and interference with the performance of their duties. The United States supports these immunities, because respect for them is required by international law, but also because the United States would seek and would expect to have these immunities extended to its own officials under the same circumstances. The United States would also vigorously insist that any foreign government intervene at the earliest practicable moment under its domestic law.

Sincerely,

/s/ Abraham D. Sofaer
ABRAHAM D. SOFAER